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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-322

MICHAEL SANTO POLIZZI, JACK S. SHAPIRO, PETER JAMES BELLANCA, ARTHUR J. ROOKS and ANTHONY JOSEPH ZERILLI,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit

Michael Santo Polizzi, Jack S. Shapiro, Peter James Bellanca, Arthur J. Rooks and Anthony Joseph Zerilli, your petitioners, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cause on April 30, 1974.

OPINIONS BELOW

Petitioners, together with Anthony Giordano of St. Louis, Missouri, and Emprise Corporation, a New York corporation, were defendants jointly tried in the United States District Court

for the Central District of California. Petitioners and their co-defendants separately appealed to the United States Court of Appeals for the Ninth Circuit, and the appeals were consolidated in the Court of Appeals.

The consolidated cause was decided by a panel of the United States Court of Appeals on April 30, 1974. Each of the three judges wrote separate opinions on the issues raised on appeal, each judge writing on different issues. The opinions have not yet been officially reported. They are reproduced as Appendix A hereto.

On July 25, 1974, the Court of Appeals modified the opinions of April 30, 1974, in certain respects and denied petitions for rehearing and rejected suggestions for rehearing in banc. The modifying order has not yet been officially reported. It is reproduced as Appendix C hereto.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 30, 1974. (See Appendix B.) Timely petitions for rehearing, with suggestions of appropriateness of rehearing in banc, were filed within the time as extended by the Court of Appeals. They were denied on July 25, 1974. (See Appendix C.)

On August 10, 1974, Mr. Justice Douglas extended the time within which to file a petition for a writ of certiorari to September 23, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

A single petition for a writ of certiorari is being filed in behalf of these five petitioners, pursuant to Rule 23(5) of this Court. Separate petitions are also being filed in behalf of Anthony Giordano and Emprise Corporation.

QUESTIONS PRESENTED

I

Whether the branding by the Attorney General and the prosecutor of certain petitioners as members of the so-called "Mafia" poisoned the grand jury and all subsequent proceedings so as to deprive petitioners of their Fifth and Sixth Amendment rights to due process of law and a jury trial free of unconstitutional impediments.

II

Whether petitioners were deprived of a fair trial because of prejudicial news publicity, including

A. Whether several in camera interrogations by the trial Court were adequate, and

B. Whether the exclusion of petitioners and their counsel from the interrogation deprived them of Fifth and Sixth Amendment rights.

III

Whether the government's disclosure obligation under *Alderman v. United States*, 394 U. S. 165 (1969), after confession of illegal electronic surveillance, required affirmative admissible evidence of the information obtained and its dissemination, thereby presenting the question of whether all petitioners, including also those not acknowledged to have been surveilled, were accorded a proper *Alderman* hearing in this case.

IV

Whether petitioners were prejudiced by the Court's handling of the Lands transcript, including:

A. the failure to impose sanctions for violation of the Jencks Act (18 U.S.C. § 3500), and

B. the deliberate misrepresentations to the jury by the prosecution, with the approval of the Court, as to its contents.

V

Whether the government's failure to disclose highly unusual leniency agreements and other inducements granted to its key witness, Maurice Friedman, requires a reversal of petitioners' convictions or further remedial action in the light of *Giglio v. United States*, 405 U. S. 150 (1972).

VI

Whether numerous errors throughout these proceedings, acknowledged by the Court of Appeals but characterized in the opinion as non-prejudicial or non-reversible, combined together to cause a prejudicial totality of errors which deprived petitioners of a fair trial and due process of law.

VII

Whether certiorari should be granted for reasons contained in petitions for a writ of certiorari being filed by co-defendants Anthony Giordano and Emprise Corporation who were jointly tried with these petitioners and whose convictions were jointly affirmed with these petitioners.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

Fifth Amendment.

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statutes of the United States

Title 18, United States Code

§ 1952. Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

§ 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * * * *

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially

verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

STATEMENT

Petitioners were tried jointly with Anthony Giordano and Emprise Corporation, a New York corporation, on a ten-count indictment. The first count alleged a conspiracy to violate the Travel Act, Title 18, United States Code, Section 1952, and there were nine substantive counts charging violations of § 1952. Rooks, Giordano and Emprise Corporation were charged only in the conspiracy count; the other petitioners were named in some or all of the substantive counts, as well as the conspiracy count.

After numerous pre-trial hearings before a succession of three district judges, trial began on February 15, 1972, before the Honorable David W. Williams in the United States District Court for the Central District of California. The trial lasted for approximately 11 weeks and on April 26, 1972, the jury returned a verdict finding all defendants guilty on the conspiracy count, and various defendants guilty on the substantive counts submitted, with the exception of one count on which the jury was unable to agree upon a verdict as to petitioner Polizzi.

In connection with post-trial motions, a hearing in excess of one week was conducted in the trial Court, primarily on the question of the taint of admittedly illegal electronic surveillance directed against several defendants. All post-trial motions were overruled, and petitioners were sentenced as follows:

Polizzi—six counts—four years imprisonment and a $40,000.00 fine (55 R.T. 10,939-10,941).*

Shapiro—six counts—three years imprisonment and a $30,000.00 fine (55 R.T. 10,953-10,954).

Bellanca—seven counts—five years imprisonment, suspended on condition that he spend 179 days in a jail-type institution, and a $20,000.00 fine (55 R.T. 10,984-10,986).

Rooks—one count—five years imprisonment, suspended on condition that he spend 90 days in a jail-type institution, and a $10,000.00 fine (55 R.T. 10,996-10,997).

Zerilli—eight counts—four years imprisonment and a $40,000.00 fine (55 R.T. 10,930-10,931).

As to the other defendants, Giordano was sentenced on one count to four years imprisonment and a $10,000.00 fine (55 R.T. 10,973), and Emprise Corporation was sentenced on one count to a fine of $10,000.00 (55 R.T. 10,920). Execution of all of the sentences has been stayed pending determination of the petitions for writ of certiorari.

The issue of whether there was a submissible case was presented to the Court of Appeals and ruled adversely to petitioners, although the evidence was not discussed as to these petitioners. (See Section XVII of Opinions below, App. A-70 to A-71.) These petitioners are not presenting a question of the sufficiency of the evidence in this petition. Accordingly, the evidence will not be stated herein except to the extent that it may be relevant to the questions presented by this petition. (For a detailed statement of the facts, if desired, the Court's atten-

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* As used herein, "R.T." refers to the Reporter's Transcript by volume and page. "Z.C.T." refers to the larger Clerk's Transcript submitted in conjunction with the appeals of Zerilli et al. There was also another Clerk's Transcript in the Emprise Appeal.

tion is directed to a separate volume of Appellants' Statement of Facts filed in the Court of Appeals. A copy thereof is being filed with the Clerk of this Court.)

Petitioners believe that many errors took place during the trial. Many of them were recognized as such by the Court of Appeals in the opinions of April 30, 1974. Not all such errors are being presented in this petition, but because of the magnitude of this case and the number of major errors and significant questions involved, the number of questions presented by this petition is larger than may be customary for petitions for writ of certiorari.

A brief synopsis of the facts would, we believe, be useful to this Court in getting an overview of the background of this case:

The events took place in 1966 and 1967. They started when one Maurice Friedman began to organize a group to build and operate a hotel and gambling casino in Nevada, to be known as the Frontier Hotel. Early in his activities when his initial prospective investors were not producing as he expected, he was in contact with Polizzi and Zerilli as to their possible investment in the hotel and casino. It soon developed that Polizzi and Zerilli might have difficulty in obtaining approval from the gambling authorities in Nevada to become stockholders, apparently because of Zerilli's ownership interest and managerial position with a pari-mutuel race track in Detroit and other background investigations.

Subsequently petitioner Shapiro became interested in participating in the hotel and casino and secured others from the Detroit area as potential investors. Petitioner Bellanca, a licensed attorney in Detroit, performed numerous legal services for the potential investors, and he and Shapiro, as well as other investors, made numerous trips between Detroit and Las Vegas. Some of these trips involved stopovers in Los Angeles for plane

connections—on this basis, the government alleged venue in Los Angeles. During this period of time, Zerilli and Polizzi also traveled to Las Vegas, generally for vacation reasons, but occasionally they would discuss their own possibilities of investment. In addition, Polizzi, who was in the plumbing supply business, sold the plumbing fixtures to the hotel.

Petitioner Rooks was an investor in the enterprise and borrowed money from Emprise Corporation. Giordano, a resident of St. Louis, was apparently charged with being responsible for an investment by a Mr. Sansone of St. Louis; the sufficiency of the evidence as to Giordano is presented in his separate petition for a writ of certiorari.

Ultimately the hotel was licensed and opened for business in July, 1967. By that time, Friedman had withdrawn from the project because of other legal problems which he had, including a Travel Act violation involving cheating at card games, which later gave rise to additional offenses, viz., theft of grand jury transcripts and obstruction of justice for bribery of a witness. See *United States v. Roselli*, 432 F.2d 879 (9th Cir. 1970), and *United States v. Friedman*, 445 F. 2d 1076 (9th Cir. 1971), for some indication of his nefarious conduct.

When the hotel opened, it had some financial problems, including pressure from the landlord and his representative, Louis Feil. Ultimately the investors were forced to sell the hotel to the Howard Hughes interests in November, 1967. All of the investors received their full investment upon the sale to the Hughes organization.

The key government witness was Maurice Friedman who, at the time of trial, was under sentence for his various federal convictions. Although there was strenous denial by the government of any deals with Mr. Friedman, all of his sentences were reduced to the period of time served, with the approval of the prosecutor in the instant case, and he was released from custody

within six weeks after the conclusion of this trial. An issue under *Giglio v. United States*, 405 U.S. 150 (1972), is involved and presented in Question V of this petition. Without Friedman's testimony, no case would have been made. Petitioners believe that no case was made even with his testimony, and that there was no violation of the Travel Act. (See Question I of petition for writ of certiorari filed by Emprise Corporation.)

There was much disagreement during trial between government counsel and defense counsel and between defense counsel and the Court. The evidentiary mistakes of the Court, the atmosphere of the trial, and misconduct of the prosecutor sanctioned by the Court all created an aroma of guilt which permeated the trial and prevented petitioners from having a fair trial. Many such errors were acknowledged by the Court of Appeals.

After conviction, overruling of post-trial motions, and sentencing, all of the defendants appealed to the United States Court of Appeals for the Ninth Circuit. The cause was argued as a consolidated matter on September 5, 1973, and three opinions were filed by a panel of the Court (including one District Judge) on April 30, 1974. (See Appendix A for the opinions.) On July 25, 1974, petitions for rehearing were denied by the Court of Appeals, and some modifications of the original opinions were made. (See Appendix C.)

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals affirming petitioners' convictions.

REASONS FOR GRANTING THE WRIT

I

"Mafia" Enemies List

In 1969 former Attorney General Mitchell included petitioners Zerilli and Polizzi on a list of alleged members of "organized crime". 115 Cong. Rec., part 17, pp. 23440-23441 (Aug. 12, 1969). That public denunciation of private citizens, never convicted of any crime, by the nation's chief law enforcement officer,* coupled with its prejudicial sequelae in the grand jury, trial, and appellate stages of this case, require a reversal of the convictions because of the denial by the Department of Justice of petitioners' Fifth Amendment right to due process of law and the de facto nullification of their Sixth Amendment right to a jury trial.

The prosecution's harmful use of the Attorney General's list in this case began during the grand jury's investigation (App. A-34).** On June 11, 1970, prosecutor Nissen asked Abe Phillips in the grand jury: "Are you telling us you did not know Tony Zerilli to be a Detroit member of the Mafia, Cosa Nostra?" Even in the limited portion of the grand jury record disclosed to petitioners after indictment, there were several additional prosecutorial suggestions to the grand jury of fear on the part of witnesses and threats of force—despite the fact that no witness testified to threats or fear. The grand jury's deliberations were tainted by an atmosphere of potential violence created out of whole cloth by the Department of Justice. The re-

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* See *Wisconsin v. Constantineau*, 400 U. S. 433 (1971).

** Without access to the full confidential Department of Justice files (cf. *United States v. Berrios*, — F. 2d —, 15 Cr. L. 2508 (2nd Cir. Aug. 8, 1974)), petitioners can only speculate on the role played by this "enemies list" in the convening of the grand jury.

sulting indictment should have been dismissed. Cf. *Alexander v. Louisiana*, 405 U. S. 625 (1972), and *Peters v. Kiff*, 407 U. S. 493 (1972).

The prejudicial consequences of the smear of petitioners Zerilli and Polizzi did not end with the indictment of the seven defendants in this case. Despite a pretrial recognition by the Court of the prejudice of the "Mafia" reference and a direction to the prosecutor to avoid any such reference (R. T. 2/14/72, p. 29), the prosecutor, on cross-examination of Zerilli, attempted to establish that Zerilli's reputation was bad, and, for that reason, that Zerilli believed he was not licensable in Nevada (26 R. T. 5117-5119, 5197-5199). Later, the prosecutor was aided by the Court in compelling Polizzi to admit that his licensing problem was rooted in a defamatory accusation which placed him on a "Mafia list" (28 R. T. 5450-5466).

The original opinion of the Court of Appeals treated the prosecutorial attacks on the reputations of Zerilli and Polizzi as error, albeit "harmless error" (App. A-36 to A-37). The amended opinion (App. C-2 to C-3), following petitions for rehearing addressed, inter alia, to the misuse of the harmless-error rule (see Question VI of this petition), sanctioned both episodes as proper prosecution techniques, despite the rule of *Michelson v. United States*, 335 U. S. 469 (1948); it approved the prosecution's attack on the reputation of the accused, which had not been put in issue by the accused, supposedly because a bad reputation might be relevant to establish the defendant's motive to commit the crime charged.* *Michelson* condemns any detour

* Motive is an issue in most criminal prosecutions. Is the Court of Appeals suggesting that reputation evidence may be introduced by the prosecution in any case? We are not concerned here with that line of cases which permits the prosecution to prove the defendant's use of reputation as a weapon to induce fear, an element in the crime of extortion. See, e.g., *Carbo v. United States*, 314 F. 2d 718, 739-742 (9th Cir. 1963), cert. den. 376 U.S. 953, reh. den. 377 U. S. 1010, and *United States v. Billingsley*, 474 F. 2d 63, 65-66 (6th Cir. 1973).

into the area of the accused's reputation unless it is initiated by the accused, and states (1. c. 475-476):

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. * * * [The law] simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

See also *United States v. Stephens*, 492 F. 2d 1367 (6th Cir. 1974).*

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* The error under *Michelson* was aggravated by the Court's subsequent order aborting petitioner Polizzi's attempt to rehabilitate himself on redirect examination from the prosecutor's attack on his reputation. When Polizzi's counsel tried to elicit the fact that Polizzi's accuser had slandered him under conditions of absolute privilege in the Congress—so that Polizzi could not obtain public redress of the false accusation—Polizzi's rehabilitation was foreclosed by the prosecutor's sidebar objection based upon his false characterization of the contents of unlawful FBI "bugging" logs. Compare App. A-72 to A-73 with Exhibit 3 on Motion to Suppress. The Court of Appeals opinion is misleading when it states that after the bench-side conference about the logs, "the line of questioning about the Mafia was dropped by Polizzi's counsel . . ." (App. A-73). Contrary to the implication that Polizzi voluntarily abandoned this line of attempted rehabilitation, he was, in fact, prevented from pursuing rehabilitation on the "Mafia" issue when the judge told counsel at sidebar: "I don't want this gone into any further." (29 R. T. 5582).

The reputation-"Mafia" attack was mounted again in the prosecutor's summation to the jury. He not only talked of "good old fashioned Chicago type extortion" (39 R. T. 7983), but he again attached the "Mafia" label to petitioner Polizzi and also, contrary to the record, to petitioner Zerilli (39 R. T. 8004). He later retracted the statement as to Zerilli, but reemphasized Polizzi's alleged "Mafia" association (43 R. T. 8682-8683) and ended with the sinister comment as to all defendants: "And these businessmen have learned it is better to use a corporate resolution than a pistol." (43 R. T. 8683). The revised opinion of the Court of Appeals (App. C-2) was in error in stating that "there was no express reference to the Mafia in the prosecutor's statement, nor could such a reference be reasonably implied." The repeated government misuse of the organized crime label and the "Mafia list" required a new trial under *Berger v. United States*, 295 U. S. 78 (1935).

The prejudicial effect of the "Mafia" enemies list appeared outside the judicial record as well. In substantial newspaper and other publicity of the trial, Zerilli and Polizzi were repeatedly described as "alleged members of organized crime", "alleged members of the Mafia" and/or "Cosa Nostra" or "reputed chiefs" thereof. The jury was not sequestered and was not prohibited from reading the newspapers during the trial; the trial judge contemplated in his cautions to the jury that they might read newspaper headlines about the case (App. A-23, fn. 41; R. T. 2/14/72, p. J87-88; 7 R. T. 1331). At one point in the trial a headline read "TRANSCRIPT SHOWS U. S. BUGGED VEGAS DEFENDANTS' MAFIA TALKS" (9 Z.C.T. 2539), a result of the press improperly reporting a benchside conference in which the prosecutor falsely characterized the contents of the so-called Polizzi "bugging" log to abort Polizzi's attempt to rehabilitate himself after the prosecutor's attack upon his reputation (29 R. T. 5576-5582). The news reporter got the story from the prosecutor's copy of the transcript! (30 R.T. 5786-5789, 5798).

The former Attorney General created and published, without notice to petitioners Zerilli and Polizzi or opportunity to be heard, a special kind of "enemies list"—not a list of political enemies to be used for partisan purposes, about which we have been educated in the last year, but a list of targeted individuals intended to be treated as enemies of the state. That list carried with it a unique, constitutionally invalid sanction to use in the judicial record the label "Mafia", "Cosa Nostra", and similar sinister, pejorative terms implying organized criminal behavior —from the grand jury stages through the Court of Appeals— and in the press reports of the trial. That list fostered an injudicious atmosphere in this prosecution, giving putative legitimacy to a trial of the reputations of Zerilli and Polizzi in plain violation of the *Michelson* rule.* All defendants were prejudiced by the attack on reputation. In this case, from August 12, 1969, through the denial of rehearing in the Court of Appeals on July 25, 1974, all petitioners were essentially deprived of the presumption of innocence by the government's creation and use of a list of public enemies.

This case reflects a pattern of overwhelming injustice against petitioners. It had its birth in a flagrantly unconstitutional communication by the Attorney General of the United States to a Senate Committee and published in the Congressional Record. The prejudice engendered by the Attorney General's unconstitutional utterance generated a grand jury which in turn was irretrievably poisoned against two target defendants—Zerilli and Polizzi—and inevitably against their alleged associates.

From that grand jury came an amorphous charge as elusive as mercury. In the trying of the issues of this case, if there can be said to have been issues, the trial jury was oversated

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* See also the seemingly ad hominem application of the Travel Act (18 U.S.C. § 1952) and Nevada Revised Statutes, Section 463.160(1)(c), to petitioners by the Court of Appeals (App. A-7 to A-8).

not only with confusing matter but with highly prejudicial matter. No jury could have disgorged itself of the poison it was fed. The currently stinging and cruel epithet "Mafia" was branded by a hot iron upon all petitioners, however innocent they might be of such disgrace.

Thus, men of Italo-American heritage and their co-defendants present themselves to this Court with the same hope and urgency as did their forebears in unpopular causes, leaders of the Afro-American community and leaders of the Organizations of Laboring Men.

Because of conflicts in the opinion of the Court of Appeals with decisions of this Court, because of the effective denial to petitioners of due process of law and the right to a jury trial, and because of the unconstitutional application of the un-American concepts of character assassination and guilt by suspicion and association, we respectfully suggest that certiorari should be granted as to this Question.

II

Prejudicial Publicity

Petitioners argued in the Court of Appeals that the volume of the prejudicial publicity, with evidence that it reached the jury, deprived them of a fair trial. The Court of Appeals devoted the largest single portion of its opinions to this issue. See Section IV, App. A-19 to A-33. The Court characterized the problem as "not insignificant" (App. A-33).

To summarize, there was newspaper publicity in both the major Los Angeles papers during almost every one of the 48 days of trial. Petitioners moved several times for mistrial on account of prejudicial publicity. On three occasions, the judge interrogated the jury in the absence of defense counsel

and petitioners—twice during trial (7 R.T. 1326-1349 and 31 R.T. 6009-6024) and once immediately after the verdict (46 R.T. 8991-9028). During the trial, petitioners were not even informed of the judge's intention to question the jurors until after his inquiry had been completed. After the verdict, petitioners requested the opportunity to be present during the voir dire of the jury. The judge refused, stating: "I have no intention of allowing that to happen. I will not have any counsel in but I will have the reporter present." (46 R.T. 8988).

A. Six weeks after conviction, juror Palmer voluntarily appeared at the hearing on motions for new trial. He volunteered a statement to one of petitioner's counsel, indicating that the jury had been reading the newspapers throughout the course of the trial and that the publicity had had a "devastating" effect on the defendants. Attorney Weinstein immediately made an offer of proof to the trial Court as to what he had been told and requested that Palmer be sworn and questioned. The Court refused to allow Palmer to testify and suggested that petitioners attempt to secure his affidavit (48 R.T. 9088-9090). Palmer refused to give an affidavit, but a licensed private investigator who interviewed him did make an affidavit (see App. D hereto) in which the investigator testifies that Palmer confirmed that Mr. Weinstein had accurately reported what Palmer had told him. Moreover, Palmer told the investigator that thereafter the prosecution had suggested to Palmer that he had no business being there and that he should leave the court room, which Palmer did, "for (his) own good."

A review of the three voir dire interrogations conducted by the trial judge substantiates Palmer's post-verdict revelation. Jurors admitted that they had seen articles. On one occasion an especially prejudicial article which had motivated the judge sua sponte to conduct a voir dire was then in the jury room. The interrogations of the jury by the trial judge were incomplete. See, for example, 7 R.T. 1325-1326, where the first juror ques-

tioned revealed that the newspaper was in the jury room, but the Court failed to ask any other juror of the incident or to inquire who had brought it there. Palmer's post-verdict disclosures and the consistency of his story as shown by the investigator's affidavit indicate what a timely and penetrating interrogation could have produced.

The trial Court's failure to conduct proper investigations, sanctioned by the Court of Appeals, conflicts with numerous decisions of this Court in the area of prejudicial publicity. See *Sheppard v. Maxwell*, 384 U. S. 333 (1966); *Estes v. Texas*, 381 U. S. 532, 543 (1965); *Rideau v. Louisiana*, 373 U. S. 723 (1963); *Janko v. United States*, 366 U. S. 716 (1961) (see esp. Solicitor General's memorandum confessing error), *Irvin v. Dowd*, 366 U. S. 717 (1961); *Chapman v. California*, 386 U. S. 18, 43-44 (1967), and *Marshall v. United States*, 360 U. S. 310 (1959). There is also conflict with numerous decisions of Courts of Appeals—*United States v. Colabella*, 448 F. 2d 1299 (2nd Cir. 1971); *United States v. Rattenni*, 480 F. 2d 195 (2nd Cir. 1973); *United States v. Kum Seng Seo*, 300 F. 2d 623 (3rd Cir. 1962); *Marson v. United States*, 203 F. 2d 904, 911 (6th Cir. 1953); *Margoles v. United States*, 407 F. 2d 727, 731-734 (7th Cir. 1969); *United States v. Thomas*, 463 F. 2d 1061, 1065 (7th Cir. 1972), and *Mares v. United States*, 383 F. 2d 805, 809 (10th Cir. 1967).

The trial Court's refusal to allow Palmer to testify and the affirmance by the Court of Appeals are in direct conflict with *United States v. Thomas*, 463 F. 2d 1061 (7th Cir. 1972). We believe this case cannot be distinguished. The mandate of *Thomas* is unequivocal:

> "We find that there was a sufficient showing of juror exposure to prejudicial evidence to have prompted further investigation on the part of the trial judge. As in United States v. Palermo, 410 F. 2d 468 (1969), we find that this failure necessitates a new trial. Remand for the purposes

> of investigating the jury would be fruitless at this point, over two years after the close of the original proceeding. Moreover, we cannot agree that an error of this gravity, which calls into question the integrity of the jury's deliberations, can be characterized as 'harmless,' under Chapman v. California, 386 U.S. 18, 82 S. Ct. 824, 17 L.Ed. 2d 705 (1967)." (463 F. 2d at 1065).

B. Not only was the trial Court's investigation deficient in the light of these cases, but the Court's procedure which barred petitioners and their counsel from any voir dire interrogation of the jurors deprived them of their right to be present during all stages of the proceedings, contrary to the provisions of the Fifth and Sixth Amendments to the Constitution of the United States. See also Rule 43, F. R. Cr. P., and *Lewis v. United States*, 146 U. S. 370 (1892).

In *United States v. Palladino*, 475 F. 2d 65, 75 (1st Cir. 1973), the First Circuit ruled that an in camera examination of a juror who had indicated his discomfort with the subject matter of the case should have been made in the presence of defense counsel. In *United States v. Glick*, 463 F. 2d 491, 493 (2nd Cir. 1972), the Second Circuit held that "private communications between the judge and jury," without notice to defendant or counsel, or affording them the opportunity to be present, "violated the unequivocable mandate of Rule 43, which requires the defendant to be present 'at every stage of the trial.'" In *United States v. McCoy*, 429 F. 2d 739, 742 (D.C. Cir. 1970), the District of Columbia Circuit held that a post-verdict interview with a juror conducted outside the presence of the defendants and his counsel was improper and constitutionally invalid.

The Sixth Circuit invalidated the taking of the jury's verdict in the absence of counsel for the defendant in *United States v. Smith*, 411 F. 2d 733, 736-737 (6th Cir. 1969):

> "From a reading of the record it is impossible to determine the tone of voice of the jurors when they individually announced their decision, the hesitancy of their responses, and other possibilities that could have taken place and had significant meaning. Had counsel been present and something of this nature occurred, the defendant would have had the benefit of his legal advice."

The principal question probed by the trial Court here was whether the jury had succumbed to the effect of repeated media charges linking petitioners with "organized crime", the "Mafia", and "La Cosa Nostra". Petitioners suggest that questioning of the jurors individually in the sanctuary of the judge's chambers tended to validate fears generated by the media contamination. The judge admonished each of the jurors not to be "alarmed". The in camera procedure seems likely to exacerbate juror suspicion and fear of petitioners, and, at the same time, to motivate the jurors to deny any prejudice which they harbored in order to sustain their verdicts and be done with the experience. The extent of prejudice accruing to petitioners from the absence of their counsel during this in camera proceeding is not a matter for speculation and cannot be weighed against the right to be present and have the assistance of counsel.

As this Court wrote in *Glasser v. United States*, 315 U.S. 60, 76 (1942):

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The Sixth Amendment right to counsel means a right to be assisted by counsel when professional assistance is likely to be effective in protecting important rights of the accused. Juror Palmer's June 12, 1972, admission, which seriously impeached the jury's verdicts (See App. A-29 to A-30, fn. 49, and App.

D), fleshes out Palmer's guarded statements in the judge's chambers immediately after the verdicts—provocative statements suggesting jury misconduct which were not pursued by the judge (See App. A-30 to A-32, fn. 50). But Palmer's belated confession reveals how after-the-fact inquiry by counsel is an ineffective substitute for on-the-spot confrontation and assistance from counsel in the juror inquiry. With the passage of time, the opportunity to discover the essential truth erodes; the rights of the accused suffer.

Is there serious doubt that if Palmer had been properly questioned on April 26, 1972, by counsel, or by the trial judge with the assistance of counsel, the prejudicial effect on the jury of the media publicity would have been directly established by juror admissions—rather than only tantalizingly and guardedly revealed through Palmer's qualms of conscience?

It is an interesting question for speculation why the trial judge would think that once the verdicts were returned he could do a more effective job of ferreting out the truth as to the effect upon the jury of extrinsic factors if he was unaided by the presence and direct participation of counsel. The jury's work was done. Nothing said to them could interfere with the subsequent performance of their judicial duties. They had no further obligation other than to disclose the fact whether they had been exposed to and discussed the contents of substantial prejudicial publicity. Why should the Court have concluded that the presence and participation of counsel then would not aid the truth-seeking goal of his inquiry?

It is precisely because we cannot second-guess, at the expense of the fundamental and substantial rights at issue, what benefit counsel might have been to petitioners if they had been present, that the procedures followed by the trial Court in secretly interrogating the jury should be reviewed.

Because of the prejudicial publicity, because of the inadequacy of the interrogations of the jurors as to such publicity,

because of the exclusion of counsel and petitioners from the interrogation procedure, because of conflicts in the decision of the Court of Appeals with various decisions of this Court and other Courts of Appeals, and because of the deprivation of fundamental constitutional rights guaranteed in the administration of criminal justice, we respectfully suggest that certiorari should be granted as to this Question.

III

Illegal Electronic Surveillance

Prior to trial, the prosecution acknowledged that there had been illegal electronic surveillance of Zerilli, Polizzi and Giordano. Transcripts were shown (but not turned over) under very restricted circumstances only to each individual defendant and his counsel—with directions not to discuss the contents with any other defendant or counsel.

A six day post-conviction hearing, ostensibly pursuant to *Alderman v. United States*, 394 U.S. 165 (1969), resulted in the trial judge's finding that the case was untainted by any information derived by the government from the FBI trespassory microphone surveillance (55 R.T. 10,916-18). The government denied the existence of any electronic surveillance of petitioners Shapiro, Bellanca, Rooks, and Emprise Corporation (12 Z.C.T. 3241-72). The substantial FBI "bugging" logs which were turned over to petitioners after the trial* contained considerable

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* The FBI logs purporting to summarize intercepted conversations of petitioner *Zerilli* (Exh. 2 on Mot. to Suppr.) consist of 397 single-spaced typewritten pages covering 23 days during a period of microphone installation spanning 553 days from February, 1963, until July, 1964. The conversations attributed to *Polizzi* (Exh. 3 on Mot. to Suppr.) all occurred on one day in January, 1964, and form a part of the Zerilli logs (Exh. 2 on Mot. to Suppr., at pp. 205-236). The Zerilli logs purport to emanate from a gambling casino in Las Vegas (Exh. 2 on Mot. to Suppr., at pp. 1-10) and from a business

information relevant to the subject matter and theory of this prosecution.**

The logs were read by the prosecution team before the trial began. During the trial, the prosecutor referred to the Polizzi logs, threatened to reveal them to the jury, and, by falsely characterizing their contents to the trial judge (App. A-72 to A-74; 29 R.T. 5576-5582), prevented Polizzi from attempting to rehabilitate himself from the prosecutor's attack on his reputation. (See Question I presented by this petition.) Information was transmitted from the Detroit microphone source to the FBI's Los Angeles field office for use in planning physical surveillance of a visit to Palm Springs by Zerilli and Polizzi (see Exh. 2 on Mot. to Suppr., at p. 322; Exh. L on Mot. to Suppr., 3/7/64 airtel; 6 R.T. 1206-1208; Exh. SVV; Exh. M on Mot. to Suppr.; 53 R.T. 10,670-10,673). At the trial, that meeting became the subject of an offer of proof by the prosecutor.

Despite this extensive and relevant "bugging" material which was in the government's possession and used at the trial, the trial judge did not compel the government to support its repeated denials of taint with admissible testimony from the gov-

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office in Detroit (Exh. 2 on Mot. to Suppr., at pp. 11-397). The *Giordano* logs (Exh. 4 on Mot. to Suppr.) consist of 64 pages of handwritten and typewritten material attributed to conversations in St. Louis on two days in 1963, one day in 1964, and one day in 1965.

** The following passages in the logs were cited to the trial Court and the Court of Appeals as the true source for the government's focus on petitioners and for the theory of this prosecution (neither Court made a specific reference to or finding on the relevance of the material): Exh. 2 on Mot. to Suppr., at pp. 1-10, 64-65, 142, 175-176, 179, 203, 215. The relevance of the Giordano logs to this prosecution was explained in Giordano's memorandum to the trial judge (13 Z.C.T. 3595-3598).

In its original opinion, the Court of Appeals chided petitioners with this final paragraph: "We find it interesting that nowhere in their briefs do defense counsel, who had access to the logs, assert that anything in them was of such a character as to provide any leads

ernment employees who knew the facts on these relevant questions: (i) How many of the seven petitioners were subjected to electronic surveillance? (ii) At what locations and for what time periods was surveillance, if any, conducted as to each defendant? (iii) The identity of each official who directed or participated in the "bugging" of each defendant? (iv) The manner, extent, and use of the information derived from the illegal operation? No admissible evidence was received on any of these basic questions, except to the extent that one FBI agent who participated in some of the surveillance of petitioner Giordano (Robert Bender from St. Louis) was made available for limited testimony but without producing any of his field office's files on the question (53 R.T. 10,488-10,658).

Sixty FBI and Department of Justice officials admittedly had access to the logs in this case (Exh. 6 on Mot. to Suppr.), of whom ten, based in Washington, held supervisory assignments in the FBI and Department of Justice from which they were positioned to feed leads to investigators and prosecutors. The recipients thus could be insulated from knowledge of the true source of tainted information (12 Z.C.T. 3296-3313; 47 R.T. 9046-9079). Of course, covert leads could have emanated from any FBI office possessing the tainted information.*

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or information pointing to or material to the present prosecution" (App. A-78). After petitioners reminded the Court of Appeals that the tainting passages in the logs had been specifically cited in our brief (Pet. for Reh. of Polizzi et al., at p. 19, fn. 16), the Court deleted that passage and, in its amended opinion, did not speak to the question whether the cited portions of the logs might have provided leads or information relevant to the prosecution. The Court of Appeals was satisfied with the prosecution team's unsubstantiated disclaimers of taint (App. A-77).

* The FBI and Department of Justice officials on the log access list were widely scattered: 10 in Washington, D.C., 19 in Detroit, Michigan, 11 in St. Louis, Missouri, 9 in Las Vegas, Nevada, and 11 in Los Angeles (7 of them were from the prosecution team) (Exh. 6 on Mot. to Suppr.)

Henry Peterson was on the access list. For part of the time embraced by the bugging of petitioners and the trial, Peterson was the principal lawyer in the organized crime and racketeering section. For the balance, he was the assistant attorney general in charge of the entire criminal division of the Department of Justice. At all times when he had access to the logs, he was in a position to influence investigative and prosecutive decisions in this case. It was admitted that before the investigation began in Los Angeles, Peterson had urged the United States Attorney that information against Zerilli and Polizzi should be "vigorously pursued by the FBI and U. S. Attorney's Office" (Exh. 16 on Mot. to Suppr., FBI serial 92-3975-1, dated 3/2/70). Despite the government's burden to prove no taint (App. A-72), the Court would not require the prosecution to produce Mr. Peterson for testimony. When petitioners offered to bring him from Washington, he proved to be unavailable within the time permitted by the Court (54 R.T. 10,754-10,-759, 10,881-10,882).

Two other crucial government witnesses, both FBI agents, were not produced for testimony about the true source of their intelligence reports, attributed to "reliable sources," covering petitioners' alleged association in the Frontier Hotel with the government's principal witness Friedman (49 R.T. 9521-9544, 50 R.T. 9563, 9566). When petitioners offered to produce these agents from the East, at petitioners' expense, the Court made it clear that it would not countenance inquiry into the identity of the "reliable sources" (52 R.T. 10,474-10,476).

Despite petitioners' urgent requests, none of the FBI agents who monitored the output of the illegal microphones in this case was produced to establish exactly what was overheard, what was recorded, and what was done with the fruits of their illegal monitoring of petitioners' conversations. The Court would not even require disclosure of the names and addresses of the FBI monitors (52 R.T. 10,476).

The prosecutor repeatedly represented to the Court in unsworn and incompetent statements that he had turned over to the Court and counsel all fruits of the interceptions of petitioners' conversation. But again and again, tainted FBI airtels and reports surfaced as the *Alderman* hearing progressed, evidencing extensive dissemination of the fruits of the electronic monitoring to FBI divisions in many parts of the nation. See and compare some of the late-to-surface FBI airtels from the "bugs" (Exhs. 8, 9, 16 (p. 4), and L on Mot. to Suppr.) with the prosecutor's assurances that such fruits of the "bugs" did not exist (12 Z.C.T. 3249-3251, 3256-3262, 3270; 47 R.T. 9071-9073). At the time of the prosecutor's negative representations, some under oath, he was in possession of documentary evidence from Washington proving that the non-existent fruits of the "bugs" were in the possession of the Department of Justice (Exh. 1 on Mot. to Suppr., affidavit of special agent McCarthy (App. E hereto); Exh. 10 on Mot. to Suppr.; 52 R.T. 10,397-10,406; 50 R.T. 9674-9688).

On such a record, taint may not be negated solely by testimony from the prosecution team that they are unaware that any leads ultimately sprang from an electronic source. Yet that is the procedure which has been approved by the Ninth Circuit (App. A-76 to A-78). Before the *Alderman* hearing began, the trial judge recognized that taint could not be negated solely by proof that the prosecution team believed they had a "clean" case, so long as there existed a real possibility that tainted leads were transmitted to the prosecution team by officials who had access to the fruits of the "bugs" (47 R.T. 9073). But the prosecution was never required to, and did not, produce competent evidence that tainted leads were not injected into the investigation of the case in a manner calculated to disguise their true source. In fact, FBI reports carried an underscored warning that information from electronic sources, "if utilized, should be carefully paraphrased in order to further protect the identity of this source. This information is not to be distributed without Bureau authority."

Two weeks before the *Alderman* hearing began, the Court properly ordered the government to produce at the hearing all officials who had access to the fruits of the "bugs" (12 Z.C.T. 3294). The next day the Court rescinded the order (12 Z.C.T. 3321). The Court of Appeals noted that petitioners produced none of the 60 officials on the access list (App. A-78), even though the Court recognized that the burden of proof of no taint was on the government (App. A-72). It would have been economically impractical for petitioners to bear that burden where forty of the percipient witnesses were employed by the government east of the Rocky Mountains, and the hearing was in Los Angeles (Exh. 6 on Mot. to Suppr.).

Another panel of the Ninth Circuit has recognized the importance of the government having to make its *Alderman* showing in a manner which at least insures that the discipline of the perjury statute will apply to the government's affiant. *United States v. Alter*, 482 F. 2d 1016, 1026-1027 (9th Cir. 1973). The only affidavit in this case which colorably lays a foundation for the parameters of electronic surveillance and the dissemination of its fruits, an affidavit of special agent McCarthy (see App. E hereto), does not begin to satisfy the evidentiary requirements for proof either of the existence or the non-existence of a government record (see Rules 44, F. R. Civ. P., and 27, F. R. Cr. P.). Special agent McCarthy was curiously vague in his affidavit on a number of essential facts. What records in the FBI were available to him in order to perform the inquiry? What is the identity of "all logs and airtels which were previously furnished to the United States Department of Justice"? When were they furnished? To which of the defendants did they relate, if any? When were the "original tape recordings relating to the transcripts submitted in this case . . . routinely destroyed", and by whom?

Other documents were submitted about the same time as the McCarthy affidavit. One was a letter dated July 20, 1971 from the chief of the organized crime and racketeering section (Wil-

liam S. Lynch) to the United States Attorney in Los Angeles listing the microphone sources that were known to intercept the voices of three of the petitioners. It is silent on how the fruits of the disclosed monitoring were disseminated and used. Another was an unsworn transmittal memorandum without signature purporting to emanate from the FBI Director on August 2, 1971, addressed to the Special Agent-in-Charge of the FBI's Los Angeles office. That memorandum refers to an earlier FBI letter to the Department of Justice dated May 28, 1971 (Exh. 10 on Mot. to Suppr.). None of these letters is under oath. The prosecutor's affidavit of May 19, 1972, appears to be a recapitulation of these incompetent and unsworn documents (12 Z.C.T. 3241-3272).*

The end result is that there are no competent documents, submitted under the penalties of perjury, and no oral testimony whatsoever to establish whether and to what extent any of the seven defendants was subjected to illegal electronic surveillance. The essential defect in the government's *Alderman* representation is that it was apparently intentionally structured in the form of unsworn, incompetent statements on the crucial facts which the Court must know in order to make a finding whether

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* The prosecutor's memorandum and affidavit of May 19, 1972, falsely attributed the "sole source of this entire prosecution, the source of (the government's) investigation, *the source of all its evidence*, the source of its theories, its preparation for trial and presentation at trial. . . ." to an interview with Maurice Friedman in the United States Attorney's office in Los Angeles on February 18, 1970 (12 Z.C.T. 3254-3255; emphasis in the original). But petitioners proved conclusively that the United States Attorney's office had the central thesis of this prosecution at least a year earlier when Friedman was sentenced (12 Z.C.T. 3307-3309, 3312-3313; Exh. 5 on Mot. to Suppr.). The prosecutor's deception on the true source of the case urgently required a penetrating evidentiary inquiry into the entire route by which the electronic "poison" was disseminated from the three known "bugs" by the F.B.I.

Furthermore, Friedman testified at the trial that he had never met Giordano (6 R.T. 1177). The source as to Giordano must have been the Giordano logs, as explained in the Giordano memorandum to the trial judge (13 Z.C.T. 3595-3598).

the case was tainted by impermissible evidence or leads to evidence as to each or any of the alleged conspirators.

Courts of Appeals are in some disagreement on the requirements for a negative finding on the existence of electronic surveillance. The Seventh Circuit seems to require a negative representation in the form of an affidavit by the United States Attorney or the head of a federal agency. *Korman v. United States*, 486 F. 2d 926, 931 fn. 10 and accompanying text (7th Cir. 1973). The Third Circuit will accept an unsworn letter from an assistant United States attorney. *United States v. D'Andrea*, 495 F. 2d 1171, 1173 (3rd Cir. 1974). The Ninth Circuit seems to be in conflict. In the instant seven-defendant conspiracy prosecution, where extensive unlawful surveillance was confessed as to three defendants, the Court of Appeals has accepted the assistant United States attorney's negative affidavit based upon inconclusive, vague and incompetent documents. See also *United States v. Fitch*, 472 F. 2d 548, 549 (9th Cir. 1973). On the other hand, in a grand jury investigation, another panel in *United States v. Alter*, 482 F. 2d 1016, 1026-1027 (9th Cir. 1973), rejects a negative affidavit of a United States attorney unless it clearly subjects him to the penalties of perjury.

The Second Circuit has held that where there is conclusive evidence of improper electronic surveillance, e.g., where, as here, it has been confessed by the prosecution, the government's evidentiary burden should be higher. Chief Judge Kaufman wrote in *United States v. Huss*, 482 F. 2d 38, 50-51 (2nd Cir. 1973):

> "The teaching of the Supreme Court in Alderman v. United States, *supra*, cannot be avoided. We are instructed that when illegal electronic surveillance has come to light it is the adversary system, not representations by the government and not *in camera* decisions by the court, which

> must be relied upon to determine whether overheard matter is 'relevant' to the taint hearing. Here, the logs represent only a monitor's summary of the intercepted conversation. In a case such as this, however, with doubt cast upon the government's proof by their main witness's own admission of knowledge of the wiretap, we cannot ignore the significance to the adversary character of the taint hearing of the destroyed records." (footnotes omitted).

The Second Circuit pointed out that where the record was in conflict on how the fruits of the taps were disseminated within the FBI, competent courtroom evidence would not be obviated by argument and prosecutor representation (482 F. 2d at 50, fn. 9):

> ". . . The record is even silent as to the name of the government agent who supervised that wiretap. The government did not call any of that monitors to testify, although it represented at oral argument that the tapes were heard only by the monitors. *We cannot accept these representations in lieu of evidence.*" (Italics supplied.)

None of the monitors was called in this case because the trial Court did not "see the materiality of" the potential testimony of the monitors (52 R.T. 10,476). The Ninth Circuit's rejection of the monitors' testimony (App. A-78) is in conflict with the procedure followed in numerous decisions of other Courts: *United States v. Stassi*, 431 F. 2d 353, 354 fn. 6, 355 fn. 9 (5th Cir. 1970), *Baker v. United States*, 430 F. 2d 499, 500 fn. 4, 501-502 fn. 7 (D.C. Cir. 1970), cert. den. 400 U.S. 965 (1970), *United States v. Clay*, 430 F. 2d 165, 168-169 fn. 6 (5th Cir. 1970), rev. on other grounds 403 U.S. 698 (1971); *United States v. Ivanov*, 342 F. Supp. 928, 930-935 (D.N.J. 1972). Washington-based FBI supervisors have also been required to testify in order to reveal the handling of monitored information. *United States v. Alderisio*, 424 F. 2d 20, 24 (10th Cir. 1970), *United States v. Giordano*, 440 F. 2d

449, 451 (6th Cir. 1971), aff'd after remand, 450 F. 2d 43 (6th Cir. 1972).

The failure to require FBI monitors' and supervisors' testimony was particularly prejudicial in the instant case because of the unique facts here. The prosecutor possessed and used the logs during trial (29 R.T. 5576-5582). A large quantity of files in the control of James Ritchie, a Detroit-based Strike Force attorney who was on the log access list, were borrowed by the Los Angeles prosecution team and returned before the indictment. No competent evidence was produced as to the contents of those files or their sources. Ritchie actually questioned witnesses before the grand jury in this case, and although he was on the access list for the electronic information, the Court did not require his testimony at the hearing (Exh. 6 on Mot. to Suppr.; 52 R.T. 10,322-10,323; 49 R.T. 9346-9351, 9372-9375; 50 R.T. 9641-9642, 9769-9770, 9783-9786; 52 R.T. 10,272-10,277, 10,291-10,302; 53 R.T. 10,693-10,699).

Despite a six-day *Alderman* hearing with substantial electronic material found in the FBI's Detroit, St. Louis, Las Vegas, and Los Angeles field office files, the Courts below declined to require the government to show by evidence (rather than by representation) that the FBI "poison" was not filtered through as blind leads to the prosecution team. Petitioners were entitled to a full hearing on this issue, in which the prosecution should have been required to make full disclosure and produce all witnesses for examination before the Court could have determined whether the government had sustained its burden of proving the non-existence of taint from the illegal conduct.

The federal courts have had sufficient experience in taint hearings in the five years since *Alderman* to reveal several areas in which procedural guidance by this Court is required. This case presents a fair spectrum of those *Alderman* conflicts which have emerged in the several Circuits that have dealt with the

difficult balancing of interests peculiar to governmental electronic surveillance.

Because of the conflicts which have developed and the need for clarification and guidance by this Court, we respectfully suggest that certiorari should be granted as to this Question.

IV

Jencks Act—Lands Transcript

A. Prior to trial, certain guidelines had been established by the District Court for production of material under the Jencks Act (18 U.S.C. § 3500). With reference to the government's principal witness, Maurice Friedman, the final order was to deliver the material when the jury was sworn. The prosecutor delivered some material but not what came to be known as the Lands transcript.

During the third day of cross-examination of Friedman, counsel for one of the petitioners, having been assured by the prosecutor's conduct that all prior statements of the witness had been furnished, asked him if it was not true that it was not until after he had been convicted and sentenced for perjury and attempted bribery of a witness that he first told someone "anything about a hidden interest" (8 R.T. 1573). Almost as if this was the opening that the prosecutor and the witness were waiting for, Friedman answered, "Long, long before. The time was during the Friars Club investigation in 1967." (8 R.T. 1574). A motion under the Jencks Act was renewed (8 R.T. 1576-1591), and the prosecutor produced a tape recording and transcript of Friedman's conversation on October 26, 1967 with Dr. Victor Lands (Exh. SUU for Ident.)*

* Friedman and Dr. Lands were co-conspirators and joint indictees in the Friars Club case. The recording was made by Dr. Lands, apparently without the knowledge of Friedman, and in the course of their discussion about the Friars Club matter, Friedman referred to his Frontier Hotel activities.

The prosecutor desperately sought to justify his blatant violation of the Jencks Act (8 R.T. 1577-1578), but the Court ordered the transcript produced. The treatment by the Court of Appeals of this violation of the Jencks Act (see Section VIII of opinions below, App. A-44 to A-45) is first to suggest that it may not have been a violation, but then to hold that the untimely production "was not prejudicial" (App. A-44),* and that the use and abuse of it thereafter was error, but not "so prejudicial as to require reversal" (App. A-47).

The failure to produce the Lands transcript was a clear violation of Section 3500, which defines "statement" in sub-section (e) (2):

> "A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement."

The Court of Appeals states (App. A-44) that disclosures are required only for impeachment purposes, but there is no such limitation in the Jencks Act. By Section 3500 (b), the United States must "produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." Nowhere does it indicate that it may only be used for impeachment purposes based upon the government's subsequent use of the Lands transcript as a purported prior consistent statement, it was certainly a statement related to the subject matter as to which Friedman had testified.

The prosecutor having failed to comply with the mandate of the Jencks Act, petitioners' motion under § 3500(d) to strike his

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* Had it been timely produced as required, the entire cross-examination of Friedman—at least that part which elicited the surprising answer—would have been different.

testimony (8 Z.C.T. 2214-2217) should have been granted, or, at the very least, petitioners' motions for mistrial (10 R.T. 1989-1990, 8 Z.C.T. 2221, 11 R.T. 2277-2279) should have been granted.

The Jencks Act is probably the most used but perhaps most misunderstood procedural statute in the trial of federal criminal cases. With every witness it is called into use. To sanction clear abuses of the mandate of the law, even under the umbrella of the "harmless-error" doctrine, encourages further abuse. Only this Court can stop the practice.

Because of the conflict of the decision of the Court of Appeals with the clear mandate of *Jencks v. United States*, 353 U.S. 657 (1957), and 18 U.S.C. §3500, and because of the importance of this question in the administration of criminal justice, we respectfully suggest that certiorari should be granted as to this Question.

B. Friedman's grand jury testimony and FBI interviews, produced before his testimony, indicated that he had never made a claim that there were "hidden interests" in the Frontier Hotel. He acknowledged that he had told the FBI that there were no hidden interests (8 R.T. 1573). Then suddenly he revealed the existence of the recorded Lands transcript (8 R.T. 1573).

But when the Lands transcript finally surfaced, it was apparent that the words "hidden interest" had not been used by Friedman. Nevertheless the prosecutor, by maneuvers encouraged by the Court, convinced the jury that the transcript, which was not in evidence, stated that Friedman had said that petitioners Zerilli and Polizzi had hidden interests.

In an attempt to keep out of the trial the words "Mafia" and "Cosa Nostra", a commendable desire which did not persist

later in the trial (see Question I presented by this petition), the prosecutor, with the blessing and direction of the Court, proceeded by leading questions to elicit from Friedman the outrageous misrepresentation that he had said in the conversation with Dr. Lands that "certain hidden interests in that casino were going to come out," and that when he used the phrase "hidden interests" (which of course had never been used) he was referring to petitioners Zerilli and Polizzi (10 R. T. 2000). Such a falsification of the record was a fraud by the prosecutor, countenanced by the Court. Subsequently the prosecutor, in closing argument, reiterated that, as early as 1967, Friedman had mentioned petitioners Zerilli and Polizzi as holding hidden interests in the hotel (39 R.T. 7985-7986).

The Court of Appeals (App. A-46) finds error in the handling of the Lands transcript and says: "The court thus should not have admitted any testimony referring to the Lands transcript." But the Court finds (App. A-47) "in light of the substantial evidence" (never discussed by the Court in its opinions) that the error was not "so prejudicial as to require reversal."

That the whole matter was indeed prejudicial was demonstrated by the fact that the jury requested a re-reading of the evidence pertaining to the Lands transcript (46 R.T. 8953). The prosecutor objected but the defense agreed that the testimony should be re-read to the jury (46 R.T. 8955-8957); the Court, however, told the jury that the Court and "counsel" preferred that the testimony not be re-read, and the jury withdrew the request (46 R.T. 8964). The jury having requested that just two brief portions of the testimony of a long trial be re-read, it obviously was a very significant aspect of the case in the minds of the jury, and there was no basis for the Court of Appeals to conclude that the error was harmless. The trial Court's action was clearly contrary to the American Bar Association Project on Standards for Criminal Justice, Standards Relating to Trial by Jury, Section 5.2(a).

The deliberate misrepresentation to the jury by a government witness, under the leading direction of government counsel at the suggestion of the Court, violated petitioners' rights. In sanctioning such misrepresentation, the opinion of the Court of Appeals is in conflict with opinions of this Court such as *Napue v. Illinois*, 360 U.S. 264 (1959), and *Mooney v. Holohan*, 294 U.S. 103 (1935). See also *United States v. Achtenberg*, 459 F. 2d 91, 98-99 (8th Cir. 1972), and *DeChristoforo v. Donnelly*, 473 F. 2d 1236, 1240-1241 (1st Cir. 1973). Cf. *United States v. Ash*, 413 U.S. 300, 320 (1973).

Because of the conflict of the opinion of the Court of Appeals with decisions of this Court and other circuits, and because the Court of Appeals has sanctioned deliberate misrepresentations by the prosecution to the jury, we respectfully suggest that certiorari should be granted as to this Question.

V

Leniency Agreements (Giglio)

Maurice Friedman was the prosecution's principal witness. At the time of his testimony, he was serving sentences for twenty-seven felony violations of federal law in three separate prosecutions, including Travel Act (card cheating),* theft of grand jury transcripts,** and obstruction of justice for bribery of a witness, such sentences having several more years to run.

On February 24, 1972, this Court decided *Giglio v. United States*, 405 U.S. 150 (1972). On March 3, 1972, petitioners moved for disclosure of promises by the prosecution to Fried-

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* See *United States v. Roselli*, 432 F. 2d 879 (9th Cir. 1970), cert. den. 401 U.S. 924, reh. den. 402 U.S. 924.

** See *United States v. Friedman*, 445 F. 2d 1076 (9th Cir. 1971).

man. The trial Court ordered the prosecutor to disclose all promises to Friedman, and the prosecution stated that his only promise was that, if Mr. Friedman testified, "it will be brought to the attention of the parole board . . . It is as normal as blueberry pie." (12 R.T. 2461). The prosecution has steadfastly maintained that that was the totality of their arrangement.

The undisputed facts are:

1. On April 26, 1972, petitioners were found guilty.

2. On May 1 and May 2, 1972, three federal judges signed orders, with the approval of the prosecutor in the instant case, which effectively reduced Friedman's sentences to time served.*

3. On June 13, 1972, the day after petitioners' motions for new trial were denied, Friedman was released from federal custody, free of any conditions.

The opinion of the Court of Appeals (Section X, after changes on the petition for rehearing) holds that there were no undisclosed promises by the prosecution and that petitioners should have been aware of the fact that Rule 35 motions were pending long after the expiration of 120 days. (Actually, the available public record did not reveal the government's agreement to permit untimely consideration of Rule 35 motions; this fact did not become known until September, 1972, when petitioners' counsel ordered transcripts of the oral proceedings.)

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* Two of the judges reduced his sentence under Rule 35, F.R. Cr. P., to "time served"—463 and 775 days after finality of judgments. The third judge "corrected" the judgment to provide for parole eligibility under 18 U.S.C. § 4208(a)(2)—286 days after finality of judgment. Rule 35, of course, retains jurisdiction in the trial judge to modify a sentence for 120 days only. Cf. *United States v. Robinson*, 361 U.S. 209, 224-226 (1960). See also *United States v. Ellenbogen*, 390 F. 2d 537, 540-541 (2nd Cir. 1968), cert. den. 395 U.S. 918, reh. den. 399 U.S. 917.

The Court of Appeals has ignored this Court's rulings in *Giglio*, supra; *Napue v. Illinois*, 360 U.S. 264 (1959); *Brady v. Maryland*, 373 U.S. 83 (1962), and a host of rulings throughout the circuits which have followed *Giglio*. See, e.g., *United States v. Harris*, 462 F. 2d 1033 (10th Cir. 1972); *United States v. Mele*, 462 F. 2d 918 (2nd Cir. 1972); *United States v. Kaplan*, 470 F. 2d 100 (7th Cir. 1972); *United States v. Tashman*, 478 F. 2d 129 (5th Cir. 1973); *Taylor v. United States*, 487 F. 2d 307 (2nd Cir. 1972); *United States v. Gerard*, 491 F. 2d 1300 (9th Cir. 1972); and *Favor v. Henderson*, 348 F. Supp. 423 (W.D. La. 1972). Cf. *Burkhalter v. Texas*, 493 S. W. 2d 214 (Tex. Ct. Crim. App. 1973). Such conflicts should be resolved by this Court.

* * * * * * * *

Since the submission of this cause in the Court of Appeals, petitioners have discovered two other instances of favored treatment for Friedman which were never disclosed to petitioners. Friedman was involved in a federal investigation of official misconduct at Lompoc Prison Camp—the Department of Justice stopped prosecution of Friedman although other prisoners were tried. (See appellant's opening brief at 49-50, government's brief at 69, and reply brief at 25 in *United States v. Alessio*, pending in the Ninth Circuit Court of Appeals, No. 73-2904.) Secondly, Friedman was housed in an apartment, rather than a prison or jail, for several months prior to and during the trial of the instant case although he was still under federal sentence. Cf. *United States v. Partin*, 493 F. 2d 750 (5th Cir. 1974).

These additional matters of concealed promises and favored treatment were called to the attention of the Court of Appeals in a petition for rehearing and a motion to augment the record, but no remedial action was granted. It is respectfully suggested that this Court consider a remand of this cause for an evidentiary hearing on the factual background of all promises to and special treatment afforded Friedman.

* * * * * * * *

Because of the conflict with decisions of this Court, particularly *Giglio v. United States*, 405 U.S. 150 (1972), and conflict with decisions of other Courts of Appeals, we respectfully suggest that certiorari should be granted as to this Question. In the alternative, we respectfully suggest that the lower Court be directed to conduct further evidentiary hearings as to the promises and inducements furnished to Friedman in exchange for his testimony.

VI

Prejudicial Totality of Errors

On a number of occasions, the Court of Appeals agreed that the trial Court committed error, but held that the error was cured by instructions, or was harmless or non-prejudicial or non-reversible in the light of the "substantial" evidence of the appellants' guilt, or that the jurors had denied that they had been prejudiced, or that the trial Court did not abuse its discretion.

One demonstrable vice of the apparently unique division of labors in the writing of the 78-page tripartite opinions, plus 3 pages of modifications after petitions for rehearing, is that related contentions of error were thus not filtered through the same judicial mind to evaluate the cumulative effect of all of the independent errors. Despite the length of the opinions, the Court of Appeals nowhere summarizes the "substantial" evidence of guilt which overwhelms all of the errors.

It is one thing to say that an error is harmless or not shown to be prejudicial or that there has been no showing of an abuse of discretion. But we respectfully submit that where the entire case is filled with "harmless errors", the totality of such prejudicial error cannot be characterized as harmless. Although each may have been harmless in an otherwise properly conducted

trial, together all of the errors infected the outcome of the trial and rendered the convictions improper.

The combined opinions in the Court of Appeals demonstrate in the Court's own language the manner in which the proceedings below were permeated by the totality of the errors. Without referring to any error not acknowledged by the Court of Appeals—and there were numerous others—we would call this Court's attention to the following:*

1. The failure to advise petitioners before closing arguments that the Court intended to send the information and indictment to the jury was error, "but the failure to do so here is not prejudicial error." The Court found that in view of the detailed instructions,** "we do not find that error prejudicial in any respect." (App. A-15).

2. The instructions on specific intent "could have been more precise." (App. A-16).

3. "Even if the giving of the suppression of evidence instruction were error, we find that the weight of other evidence against appellants is such that the error could not have been prejudicial." (App. A-17).

4. The trial Court did not include skimming as one of the charges against appellants, and yet the prosecutor's argument on skimming was permitted without admonishing the jury to disregard it; whatever prejudice arose was "cured" by the instructions which did not include a reference to skimming. (App. A-18 to A-19).

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* We have cited all of these findings of error without attempting to point out how each individually was prejudicial. Some have been discussed in other Questions presented in this petition.

** The instructions were lengthy and confusing and read only once; the indictment was always in the jury room during deliberations.

5. The Court could not find such prejudicial publicity as to "require reversal as a matter of law." (App. A-20).

6. The Court acknowledged that there was a "preferable" method to that used by the trial Court in questioning the jurors about a newspaper in the jury room. (App. A-24 to A-25).

7. The trial Court's refusal to conduct a hearing on June 12, 1972, when juror Palmer revealed the effect of publicity on the jury, was criticized, although the procedure requested by petitioners for an immediate hearing "may generally be preferable." (App. A-29 to A-30).

8. After obviously being troubled by the publicity problems at the trial, the Court of Appeals concluded that "no reversible error was committed in the trial Court's handling of the question of prejudicial publicity." (App. A-33).

9. The original opinion stated as to the prosecutor's closing argument about the "Mafia" background that "appellants have failed to demonstrate that the comments contributed to an unfair trial." (App. A-35 to A-36). In the modification of the opinion after petitions for rehearing, the Court avoided the acknowledgment of error, whether or not prejudicial, by stating (erroneously) that there was no express reference to the "Mafia". (App. C-2).

10. The original opinion as to cross-examination of Polizzi and Zerilli found "danger of prejudice", "error to permit the government to begin a line of questioning with a high possibility of prejudice", and "rulings were erroneous" but not prejudicial. (App. A-36 to A-37). In the modification after petitions for rehearing, the Court for the first time blamed Polizzi for the "prejudicial Mafia connection" and reversed itself to argue that there was relevance to the cross-examination of Zerilli on his reputation. (App. C-2 to C-3).

11. The Court found that all of the episodes of misconduct by the prosecutor sanctioned by the trial judge did not "amount to a deprivation of appellants' right to a fair trial." (App. A-37).

12. The prosecutor's arguments conveying the impression that appellants were violent individuals "were not so prejudicial to appellants so as to require reversal." (App. A-38).

13. The Court stated that a reference to Chicago-type extortion "was not proper, however." (App. A-38, fn. 60).

14. The Court suggested error in the trial Court's vouching for the credibility of government witnesses. (App. A-39).

15. The Court found that evidence of Nevada law as a factual matter was "unnecessary, but not prejudicial error." (App. A-39).

16. The prosecutor's inquiry into prior attempts to invest in Las Vegas after such evidence had previously been rejected was not prejudicial "in light of other and substantial evidence supporting the verdicts." (App. A-40 to A-41).

17. The use of a deposition from another case was not "justified" but the Court avoided a decision as to "whether there was error." (App. A-41 to A-42). The Court then decided that there was no prejudice, and that the incident was insignificant. (App. A-42).

18. The Court acknowledged that "there were things said by the prosecution which would have been better unsaid," but appellants were not deprived of a fair trial. (App. A-42).

19. In commenting upon the trial judge's efforts to afford a fair trial, the Court said "errors were committed, but none so prejudicial, so fatal, either individually or collectively, as to require reversal." (App. A-43).

20. A clear violation of the Jencks Act "was not prejudicial to appellants" (App. A-44), and "appears clearly to be harmless." (App. A-45).

21. The trial Court "did commit error" in its handling of the Lands transcript, but "in light of the substantial evidence in the record supporting appellants' convictions, we do not find that the error in handling the Lands transcript was so prejudicial as to require reversal." (App. A-46 to A-47).

22. "Appellants also did not suffer prejudice" from the argument on the Lands transcript. (App. A-48).

23. The original opinion stated that petitioners were not prejudiced "as a result of the prosecution's dereliction" in concealing any undisclosed promises to Friedman. (App. A-49). The modified opinion after petitions for rehearing avoided the acknowledgement of error by deleting the sentence. (App. C-3).

24. The Court of Appeals acknowledged an incorrect representation by the prosecution as to available evidence against Giordano in order to avoid a severance. (App. A-58).

25. In addition to the foregoing, there were numerous instances in the opinions of the Court of Appeals which decided the issues on the basis of exercise of discretion or the failure to show an abuse of discretion. See, for example, App. A-14 to A-15 as to sending the statutes and regulations to the jury room, A-15 as to reading the indictment and sending copies to the jury room, A-22 as to pretrial publicity, A-22 as to investigations of the effects of publicity, A-48 as to the jury's request for a re-reading of the testimony concerning the Lands transcript, A-55 to A-57 as to various motions to transfer the cause and for change of venue, A-76, fn. 8, as to names of informants, and C-3 as to cross-examination re the "Mafia".

Although we recognize that the doctrine of "harmless error" is a necessity in the administration of justice, we believe that this

case presents an example of the dangerous trend among courts to characterize too many important errors as harmless and non-prejudicial. The constitutional rights to fair trials and due process of law are being eroded. It would be appropriate for this Court now to review this current trend and to reestablish guidelines for lower courts to follow.

This Court in *Kotteakos v. United States*, 328 U. S. 750, 758-766 (1946), cautioned against a broad application of the harmless error doctrine, and stated (l. c. 765):

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Individually all of the errors recognized by the Court of Appeals were serious and affected the process by which petitioners were convicted. In the aggregate they adversely affected the substantial rights of petitioners to a fair trial. Their cumulative effect was prejudicial. Cf. *Getchell v. United States*, 282 F. 2d 681, 691 (5th Cir. 1960).

In *Chapman v. California*, 386 U. S. 18 (1967), this Court again discussed the harmless-error rule in the setting of constitutional error and placed the burden on the prosecution not only to show that the error was harmless, but to convince the Court that it was harmless beyond a reasonable doubt. We respectfully submit that the Court of Appeals has disregarded the *Chapman* mandate, especially in those instances where there was a vague reference to undocumented "substantial evidence," or where it

was said that there had not been a showing of abuse of discretion. See also *Kastigar v. United States*, 406 U. S. 441, at fn. 55 and accompanying text (1972), and *United States v. Johnson*, 487 F. 2d 1318, 1325-1326 (5th Cir. 1974). The Court of Appeals has failed to make any finding that the many errors, a number of which are of constitutional magnitude, were harmless beyond a reasonable doubt, and the record would not support such a finding.

The fact that the jury deliberated for five days and asked for a rereading of certain evidence (46 R. T. 8953) would indicate that the evidence was not substantial, but instead that it was a very close case. Cf. *Osborne v. United States*, 351 F.2d 111, 118 (8th Cir. 1965). Any one or more of the many errors could have tipped the balance.

Especially where it is claimed that the evidence clearly shows guilt, we believe that there is a current tendency among numerous lower federal courts, including the Ninth Circuit in the instant case, to disregard the clear instructions by this Court in *Bollenbach v. United States*, 326 U. S. 607, 614-615 (1946).

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.
>
> ". . . From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate

judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Nowhere did the Court of Appeals indicate the nature of the "substantial evidence" against petitioners. The many errors were involved in a significant portion of the prosecution's presentation. Petitioners were required to rebut on irrelevant issues found by the Court of Appeals to be error. The totality of these errors, and the further errors which they produced, were prejudicial.

Because of the application by the Court of Appeals of the harmless-error doctrine in a manner contrary to guidelines established by decisions of this Court, because of the necessity of halting further erosions by many lower courts of the principles of fair trial and due process of law, and because of the importance of this issue in the administration of criminal justice within the concept of constitutional traditions, we respectfully suggest that certiorari should be granted as to this Question.

VII

Other Reasons

Petitioners were tried jointly with Anthony Giordano and Emprise Corporation, and their convictions were jointly affirmed by the Court of Appeals. Both are filing separate petitions for a writ of certiorari which present questions affecting these petitioners.

In the interests of brevity, petitioners hereby adopt the questions presented to this Court by their co-defendants, and respectfully urge that certiorari should be granted as to such Questions.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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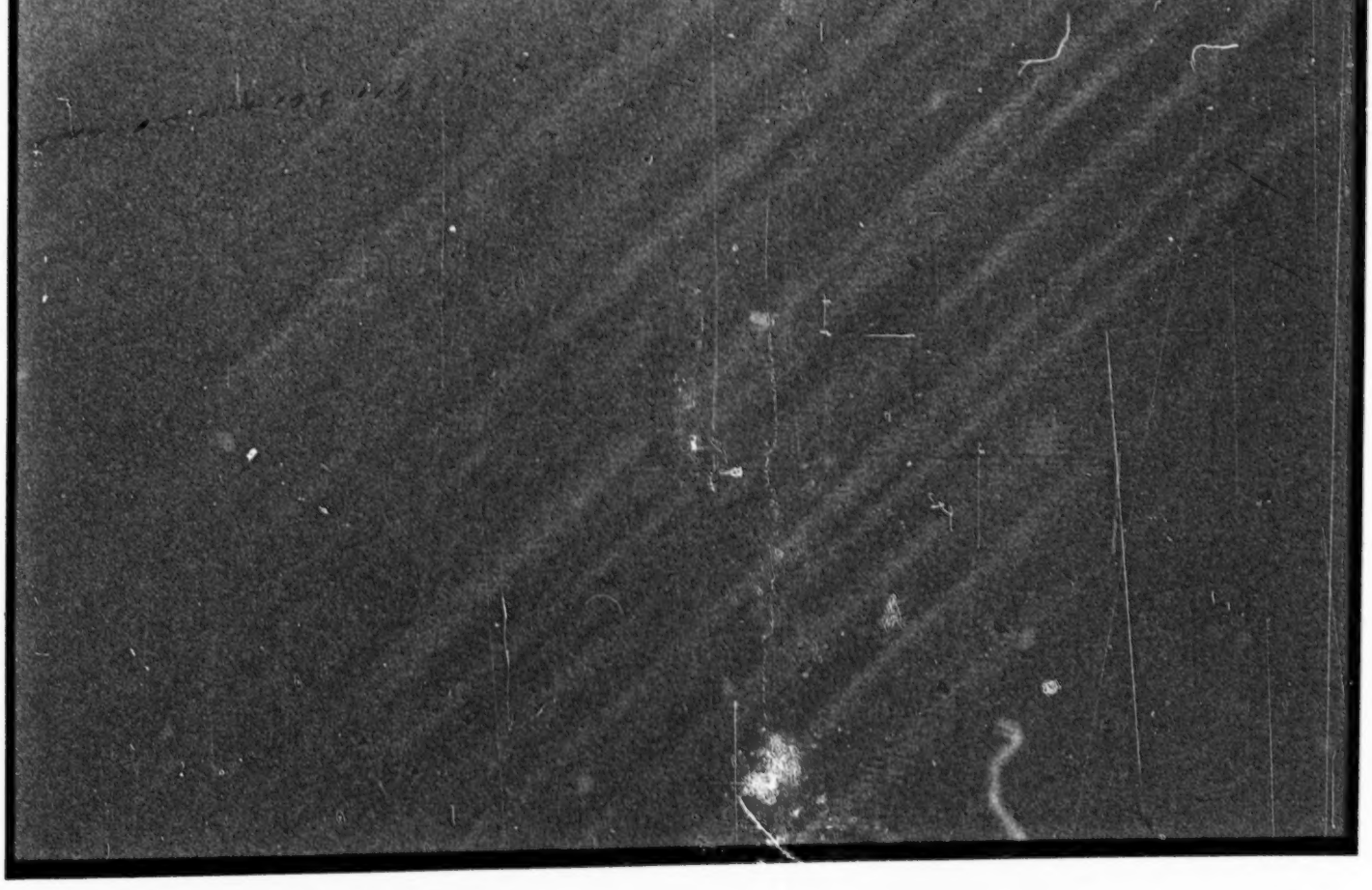

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. MICHAEL SANTO POLIZZI, *Defendant-Appellant.*	No. 72-2983
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JACK S. SHAPIRO, *Defendant-Appellant.*	No. 72-2984
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. PETER JAMES BELLANCA, *Defendant-Appellant.*	No. 72-2985
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ANTHONY GIARDANO, *Defendant-Appellant.*	No. 72-2986
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ARTHUR J. ROOKS, *Defendant-Appellant.*	No. 72-2987
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ANTHONY JOSEPH ZERILLI, *Defendant-Appellant.*	No. 72-2988
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. EMPRISE CORPORATION, a New York Corporation, *Defendant-Appellant.*	No. 72-2989
	OPINION

[April 30, 1974]

Appeal from the United States District Court
for the Central District of California

Before: BROWNING and DUNIWAY, Circuit Judges, and RENFREW,* District Judge.

RENFREW, District Judge:

In 1966 and 1967, appellants Zerilli and Polizzi acquired hidden interests in Vegas Frontier, Inc. (VFI), a Nevada corporation, which leased and operated the Frontier Hotel in Las Vegas, Nevada. VFI was also licensed to conduct gambling at the hotel, which opened in July of 1967. Neither Zerilli nor Polizzi was licensed by the Nevada gaming authorities, nor was either man's interest in VFI disclosed to those authorities. After extensive negotiations, VFI was sold in November, 1967, to Howard Hughes.

Following a very lengthy and complex trial,[1] Zerilli, Polizzi, and the other appellants were convicted of conspiracy (18 U.S.C. §371) to violate 18 U.S.C. §1952[2] (Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises) and of substantive violations of that section. Appellants challenge their convictions on a number of bases. They contend:

1. That the prosecution failed to show a violation of §1952.

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*The Honorable Charles B. Renfrew, United States District Judge, Northern District of California, sitting by designation.

[1]There were 48 days of trial reported in 11,022 pages of reporter's transcript (including post-trial motions), and 321 exhibits were received in evidence.

[2]18 U.S.C. §1952 provides in part:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section, 'unlawful activity' means (1) any business enterprise involving gambling * * * offenses in violation of the laws of the State in which they are committed or of the United States * * *."

2. That, if a violation were shown, the laws in question would be unconstitutionally vague.

3. That the court erred in instructing the jury.

4. That the publicity surrounding their trial deprived them of a fair trial and that there was jury misconduct which the court refused to investigate.

5. That the label "Mafia" was applied to them in a public list of Mafia figures made by the Department of Justice and that the list was submitted in the grand jury proceedings and in the trial in this case and that these actions constitute a deprivation of their rights of due process.

6. That the trial court committed error in the permission it gave to the prosecution to cross-examine certain of the appellants about their reputations as members of the Mafia when the appellants had not presented evidence of character or reputation.

7. That they were deprived of a fair trial by misconduct of the prosecutor which the trial court sanctioned.

8. That the testimony of a key prosecution witness should have been stricken in that the prosecution's untimely production of his pretrial statements violated the Jencks Act.

9. That error was committed in the admission of the testimony of that witness on the grounds that part of the testimony was conclusively demonstrated to be false, and admitted to be false by the witness.

10. That promises of leniency made to the witness by the prosecution were not disclosed.

11. That the acts complained of were a unitary crime and that it was not proper for them to be convicted of a conspiracy and substantive violations based upon the same conduct.

12. That the venue of the trial court was improper.

13. That the court below erred in refusing to grant appellant Giordano's motion for severance.

14. That the court below erred in failing to instruct the jury that evidence admitted after appellant Giordano had

rested at the close of the prosecution's case could not be considered against him.

15. That appellant Giordano's motion for acquittal at the close of the prosecution's case should have been granted.

16. That appellant Emprise is not liable for any criminal acts that its predecessor in interest allegedly committed.

17. That the evidence was insufficient to support their convictions.

18. That the trial was materially tainted by leads from unlawful electronic surveillance.

Having carefully considered each of these contentions, we affirm the convictions below. Although this opinion is longer than we would have preferred, appellants have raised and argued so many points in 534 pages of briefs, exclusive of appendices and exhibits, that we find a lengthy opinion unavoidable.

I. *Violation of §1952*

Appellants' threshold contention is that their conduct did not come within the coverage of the federal Travel Act (18 U.S.C. §1952), raising two issues as to the meaning of the statute. Section 1952 condemns interstate travel or the use of interstate facilities in the furtherance of "any unlawful activity," defined as including "any business enterprise involving gambling • • • offenses in violation of the laws of the State in which they are committed or of the United States • • •." A violation of §1952 thus must be premised upon another distinct violation of state or federal law.

Although state law becomes the focus of this inquiry, "the gravamen of a charge under §1952 is the violation of federal law • • •." *United States v. Karigiannis*, 430 F.2d 148, 150 (7 Cir. 1970) (Clark, J.), *cert. denied* 400 U.S. 904 (1970). "Reference to state law is necessary only to identify the type of unlawful activity in which the defendants intended to engage." *United States of America v. Rizzo*, 418 F.2d 71, 74 (7 Cir. 1969), *cert. denied* 397 U.S. 967 (1970).

While the Government's theory was not succinctly stated, either in its briefs or at oral argument, it does emerge from a careful

reading of the indictment and information[3] together with the court's instructions to the jury[4] that appellants violated the federal Travel Act by conduct which was a "business enterprise" that involved "gambling • • • offenses" in violation of Nevada Revised Statutes (N.R.S. §463.160[5] in that Zerilli and Polizzi's

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[3]The indictment names the six individual appellants and the information names appellant Emprise Corporation, the successor in interest to a merged corporation of the same name which had been dismissed from the indictment for lack of personal jurisdiction prior to trial.

[4]Both the information and indictment contain the following language, charging appellants with traveling "in interstate commerce and [using] facilities in interstate commerce with intent to:

"1. Distribute the proceeds of unlawful activity, namely: the ownership, operation of, and receipt of profits from a Las Vegas, Nevada gaming casino by persons who were not licensed and whose interest in the gaming casino had been concealed from agencies of the State of Nevada in violation of Nevada law; and

"2. Promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of unlawful activity, namely: the ownership, operation of, and receipt of profits from a Las Vegas, Nevada gaming casino by persons who were not licensed by and whose interest in the gaming casino had been concealed from agencies of the State of Nevada in violation of Nevada law • • • ."

The court's instructions to the jury were also couched in terms of the failure to disclose the interests of Zerilli and Polizzi in VFI.

[5]Nevada Revised Statutes (N.R.S.) §463.160 lays down the basic law requiring a license for gambling operations:

"1. It is unlawful for any person, either as owner, lessee or employee, whether for hire or not, either solely or in conjunction with others:

"(a) To deal, operate, carry on, conduct, maintain or expose for play in the State of Nevada any game or slot machine as defined in this chapter, or to operate, carry on, conduct or maintain any horserace book or sports pool; or

• • • • •

"(c) To receive, directly or indirectly, any compensation or reward or any percentage or share of the money or property played, for keeping, running, carrying on or permitting the same to be carried on, without having first procured, and thereafter maintaining in full force and effect, all federal, state, county and municipal gaming licenses as required by statute or ordinance • • • ."

N.R.S. §463.170 then indicates what information must be disclosed if a license is to be obtained by a corporation:

"2. No corporation • • • shall be eligible to receive or hold any license under this chapter unless all persons having any direct or indirect interest therein of any nature whatsoever, whether financial, administra-

interests in the gambling conducted by VFI at the Frontier Hotel were hidden from the Nevada gaming authorities.

Appellants' first argument is that since VFI had a gambling license as required by Nevada law, their activity could not be unlawful within the meaning of the federal Travel Act. They rely considerably on one instruction, to which the government did not object, that VFI was licensed and that the gambling it conducted could not be found illegal.[6] Appellants' counsel stated at oral argument that, even if appellants procured the VFI license fraudulently, there would be no criminal violation of Nevada law. We disagree.

This instruction meant only that the trial court did not believe that the prosecution could rely upon N.R.S. §463.160(1)(a). The license would not be viewed as void *ab initio*, and the appellants could not be prosecuted for conducting a gambling enterprise without a license. Nor could the prosecutor "pierce the corporate veil" to reach appellants.[7] The instruction does not, however, legitimize all the acts of appellants in obtaining the license. N.R.S. §463.160(1)(c) covers precisely the charges here against appellants: receiving compensation from gambling conducted without having procured and maintained licenses as required by law.[8]

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tive, policymaking or supervisory, are individually qualified to be licensed under the provisions of this chapter."

[Appellants contend that the revised N.R.S. §463.170(2), effective July 1, 1967, should have been applied. In footnote 11, *infra*, we point out the error in that contention.]

The statute governing the disclosures to be made in an application for a license provides:

"2. The application shall include:

* * * * *

"(d) The names of all persons directly or indirectly interested in the business and the nature of such interest." N.R.S. §463.200.

The forms supplied for an application by a corporation indicate that corporate officers and stockholders are to be listed as those persons interested in the business.

[6]"Since in this case a license was issued to the corporation VFI, any gambling conducted by or through VFI would not be illegal and would not be in violation of this statute [N.R.S. §463.160]." Reporter's Transcript, Vol. 43, p. 8798.

[7]See footnote 13, *infra*.

[8]See footnote 5, *supra*, for the language of the statute.

Appellants argue, however, that N.R.S. §463.160(1)(c) only requires that the gambling be licensed and does not reach fraud or other violations in obtaining the license. Acceptance of this construction of Nevada law would effectively emasculate the statutory scheme of requiring the disclosure of the identities of the persons who would be involved in the gambling enterprise. This disclosure requirement has as its purpose the prevention of the infiltration of criminal elements into gambling in Nevada.[9] Section 463.160(1)(c) requires not only that a license be procured and maintained, but also that it must be procured and maintained in a manner that satisfies the other provisions of the gambling law. The term "as required by statute" must be viewed in light of the strong state policy behind the statutes. The interpretation offered by appellants would give free rein to criminal elements in their attempts to infiltrate Nevada gambling. The most they would risk would be the administrative revocation of their corporation's license. They would become criminally liable only if they operated a gambling enterprise without procuring a license, and the most dangerous elements could easily avoid such a blatant violation of Nevada law. Given these considerations,

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[9]"It is hereby declared to be the policy of this state that all establishments where gambling games are conducted or operated or where gambling devices are operated in the State of Nevada shall be licensed and controlled so as to better protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada." N.R.S. §463.130(1).

The Nevada Supreme Court, in a decision handed down two years prior to the enactment of the statutes here in question, gave a strong policy basis for the licensing requirement:

"Nevada gambling, if it is to succeed as a lawful enterprise, must be free from the criminal and corruptive taint acquired by gambling beyond our borders. If this is to be accomplished not only must the operation of gambling be carefully controlled, but the character and background of those who would engage in gambling in this state must be carefully scrutinized.

"• • • The risks to which the public is subjected by the legalizing of this otherwise unlawful activity are met solely by the manner in which licensing and control are carried out." *Nevada Tax Commission v. Hicks*, 73 Nev. 115, 119-120, 310 P.2d 852, 854 (1957). See also *Berman v. Riverside Casino Corporation*, 247 F.Supp. 243, 250 (D.Nev. 1964), *aff'd*, 354 F.2d 43 (9 Cir. 1965).

This statement of policy was not qualified but rather reaffirmed by N.R.S. §463.130(1), *supra*.

the only reasonable construction of N.R.S. §463.160(1)(c) is that persons receiving compensation from the gambling operation must fulfill all other state requirements surrounding the granting of a license.[10]

Appellants violated those other provisions by failing to disclose the identities of Zerilli and Polizzi as persons having an interest in VFI. Under N.R.S. §463.170(2), applicants for a corporate license had to disclose "persons having any direct or indirect interest therein of any nature whatsoever, whether financial, administrative, policymaking or supervisory • • •."[11] The disclosure requirement must be complete in order to meet the policy of the Nevada gambling laws. Appellants stress that the corporate-license application form supplied by the state required only the listing of the names of corporate officers and shareholders. Since VFI's application complied with this requirement, they argue, there was no failure to disclose. This argument, if accepted, would turn the detailed statutes governing the control of licensing into a mere formality. Disclosure of nominal officers and shareholders would guarantee legality and shield the very persons as to whom the disclosure requirements are directed. The Attorney General of Nevada in 1960 gave his opinion that N.R.S. §463.170(2) gave

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[10] *See Huddleston v. United States*, ... U.S. ....., ... (1974); *cf. Rewis v. United States*, 401 U.S. 808, 811-812 (1971).

[11] Appellants have contended in their briefs that the revision of this section effective July 1, 1967, should be applied. They did not press this point at oral argument. We find their contention untenable. Although VFI's license was not issued until July 5, 1967, to be effective July 27, 1967, the Chairman of the Nevada Gaming Commission during the time in question testified that VFI had completed all the formal requirements for a license by June 28, 1967, and that it had a right to a license on that date. VFI itself had requested that the license be effective as of July 27, 1967. There is no indication that appellants made any attempt to comply with the new, revised statute, which included reporting requirements in many ways more stringent than those in the old statute. *See* N.R.S. §463.520. Nor is there any indication that the Board sought to require appellants to comply with the new statute. Thus the Board necessarily interpreted the statutes to mean that the old statute rather than the new statute governed applications completed before the new statute went into effect. Such an administrative interpretation is entitled to great weight. See footnote 12, *infra*. Moreover, appellants apparently acquiesced in this interpretation. In these circumstances, the trial court applied the correct statute.

power to state authorities "to require those persons having administrative, policymaking or supervisory interest in the operation to qualify for licensing." To utilize that authority effectively, he stressed, the authorities would need to obtain information about those persons. Official Opinions of the Attorney General of Nevada, *1960-1962*, pp. *83-84 (1960)*. There was no hint that formalities suffice or should be exalted over substance. In this case, the information and indictment emphasized that Zerilli and Polizzi held the real interests in VFI and controlled the nominal shareholders. The trial court, in its instructions on the definition of "owner" as used in the Nevada statutes, stressed the reality of ownership rather than formal titles. (Reporter's Transcript, Vol. 43, p. 8765.) These statutes require disclosure of the names of all persons with *actual* control or financial interests in the gambling enterprise.[12]

The acts of appellants charged and proven in this case therefore were prohibited by state law.[13] Appellants, however, raise further objections. They contend that, even if they did violate Nevada law, their violations were not *criminal* and therefore do not come within the ambit of §1952. They characterize their conduct as merely

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[12]The record reveals that the Nevada authorities sought in this case to go "behind" the nominal officers and shareholders and conducted a vigorous investigation to ascertain who controlled VFI. The Court gives weight to the manner in which the Nevada gaming authorities have construed the statutes under which they operate.

[13]Two other theories put forward by the government fail. One involves "piercing the corporate veil." The government argues in its brief that the Nevada statutes "provide the gaming authorities with the necessary authority to go behind the corporate license to *determine who in fact* is controlling the corporation which was granted the gaming license" (emphasis in original). That argument is foreclosed by the trial court's instruction, to which the government did not object, quoted in footnote 6, *supra*. Although that interpretation of N.R.S. §463.160(1)(a) was not the only one possible, it is not an unreasonable construction. This Court accepts it as the law of this case.

The other theory is that N.R.S. §463.160(1) requires that anyone with a direct or indirect interest in a gambling enterprise must be licensed. That statute, however, requires only that licenses must be procured as required by the law. N.R.S. §463.170(2) indicates that a corporation can receive and hold a license itself and that those persons with interests in the corporation must only be *qualified to be* licensed. *See also Berman v. Riverside Casino Corporation*, 354 F.2d 43 (9 Cir. 1965).

"operating a casino with a state corporate license but without other required state licenses." That theory, however, is based upon the government's contention that all persons with a direct or indirect interest in a gambling casino must be licensed. We find no such requirement in Nevada law.[14] The violations of Nevada law in question here were not by VFI, but rather by those in control of VFI who did not disclose the interests of Zerilli and Polizzi. The trial court preserved the corporate fiction and the legality of the gambling operations conducted by the corporation. Hence appellants' argument that N.R.S. §463.310 specifically establishes only an administrative penalty available to the authorities in this case—revocation of VFI's license—is in error. That provision does set the procedures for disciplinary action against the licensee, but here the licensee has not been prosecuted for violating Nevada law. Since there is no specific penalty prescribed for a violation of N.R.S. §463.160(1)(c), the "catch-all" section, N.R.S. §463.360 (2)[15] would apply.[16] That violation, there characterized as a gross misdemeanor, would be a *criminal* infraction.[17]

Appellants' second argument is that §1952 reaches only *wholly* unlawful business enterprises and, since gaming is legal in Nevada, the federal Travel Act does not apply. They cite *United States v. Roselli*, 432 F.2d 879 (9 Cir. 1970), *cert. denied*, 401 U.S. 924 (1971), *rehearing denied*, 402 U.S. 924 (1971), in support. Their

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[14]See footnote 13, *supra*.

[15]"The violation of any of the provisions of this chapter, the penalty for which is not herein specifically fixed, shall be deemed a gross misdemeanor, and shall be punished by a fine of not less than $1,000, or by imprisonment in the county jail for not less than 6 months, or by both fine and imprisonment."

[16]The Chairman of the Nevada Gaming Commission during the time in question testified that under the law then in effect, "any violation" of that law by individuals would mean that those individuals were guilty of gross misdemeanors where no specific penalty was provided. Reporter's Transcript, Vol. 15, pp. 3028-3029.

Indeed, other than conducting a casino without a license, which is exceedingly unlikely, it is difficult to imagine what N.R.S. §463.360(2) would cover if it did not cover conduct such as that proved in this case.

[17]Once a violation of a state criminal statute has been proved it is irrelevant whether that violation is classified as a felony or misdemeanor. *United States v. Karigiannis*, 430 F.2d 148, 150 (7 Cir. 1970) (Clark, J.), *cert. denied*, 400 U.S. 904 (1970).

reliance upon *Roselli* is misplaced. There the Court accepted only for the purposes of argument the premise that the scope of §1952 was limited to illegal business enterprises and even on that basis found such an illegal enterprise (432 F.2d 879 at 887-888). Appellants overlook that earlier in that opinion this Court observed:

> "If section 1952 applied only when all business activity was absolutely prohibited in the particular field, the reach of the section would be materially diminished without apparent reason in terms of the statute's purpose. There is no evidence that Congress intended this result." 432 F.2d 879 at 887.

Nor do appellants' general references to the legislative history of §1952 support this contention.[18] The statutory language is clear. "Section 1952 speaks not of illegal gambling, but of a more inclusive category: 'gambling • • • offenses.' " *United States v. Roselli*, 432 F.2d 879, 887 (9 Cir. 1970), *cert. denied*, 401 U.S. 924 (1971), *rehearing denied*, 402 U.S. 924 (1971). *See also Turf Center, Inc. v. United States*, 325 F.2d 793, 795 (9 Cir. 1963).

This Court's construction of the scope of §1952 will not open the federal courts to the prosecutorial abuses which appellants have depicted for the Court: prosecutions of minor illegal acts inci-

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[18]Appellants rely heavily upon the statements of Assistant Attorney General Herbert J. Miller, Jr., of the Justice Department's Criminal Division that:

> "[The Travel Act] bans unlawful businesses—not incidental illegal acts done in the course of lawful businesses." ("Legislation Relating to Organized Crime," Hearings on H.R. 468 et al., Before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess., p. 336 (1961).)
>
> "Under this bill we would have to show a business enterprise which was unlawful under the laws of the State • • •." ("The Attorney General's Program to Curb Organized Crime and Racketeering," Hearings on S. 1653 et al., Before the Senate Committee on the Judiciary, 87th Congress, 1st Sess., p. 260 (1961).)

In a law review article, the Assistant Attorney General explained the impact of the statutory intention thusly:

> "[T]o turn a gambling • • • scheme into an 'unlawful activity' within the meaning of the 'Travel Act' • • • the 'business enterprise' must involve *illegal* conduct. A program to establish a gambling casino in Las Vegas, Nevada, would not amount to 'unlawful activity.' " (Miller, The "Travel Act": A New Statutory Approach to Organized Crime in the United States, 1 Duquesne L.Rev. 181, 194 (1963) (emphasis in original).)

dental to an otherwise legal business. The legislative history of §1952 does demonstrate that its main purposes are to attack organized crime and to aid local authorities in combatting it.[19] Courts would simply not allow it to be used to extend federal prosecutions far from these purposes.[20] *See Erlenbaugh v. United States*, 409 U.S. 239, 245 (1972).

We conclude that appellants engaged in a business enterprise involving gambling offenses in violation of Nevada law and 18 U.S.C. §1952.

II. *Vagueness*

Appellants challenge the statutes under which they have been charged and convicted as being unconstitutionally vague. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Appellants' attack is directed at the Nevada statutes and not the language of §1952, which has been upheld previously against claims of vagueness. *See, e.g., United States v. Cozzetti*, 441 F.2d 344, 348 (9 Cir. 1971); *Turf Center, Inc. v. United States*, 325 F.2d 793, 795 (9 Cir. 1963); *United States v. Smith*, 209 F.Supp. 907, 917-918 (E.D.Ill. 1962). We have already held that the Nevada statutes clearly proscribe the conduct charged against appellants.[21] The construction of those statutes urged by appellants is unreasonable and conflicts with the manifest purpose of the Nevada gambling legislation requiring precise and stringent controls relating to the licensing of gambling. Violation of the statutes in the manner charged against appellants is a criminal offense.[22] In affirming these convictions, we are not enlarging the original legislation by interpretation. *Cf. Bouie v. City of Co-*

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[19]This history is outlined in some detail in *United States v. Roselli*, 432 F.2d 879, 884-888 (9 Cir. 1970).

[20]Membership in an organized criminal group is not, of course, an element of an offense under §1952. *United States v. Roselli*, 432 F.2d 879, 885 (9 Cir. 1970), *cert. denied*, 401 U.S. 924 (1971), *rehearing denied*, 402 U.S. 924 (1971). It rests with the courts to determine the reach of §1952 in a case-by-case manner.

[21]See pages 5-10, *supra*.

[22]See page 11, *supra*.

lumbia, 378 U.S. 347, 350-352 (1964); *Pierce v. United States*, 314 U.S. 306, 311 (1941).

Moreover, the trial court instructed the jury that specific intent was an element of the offense charged against appellants.[23] Thus the jury found that appellants knew that Nevada law had been violated in the procurement of VFI's license. "A mind intent upon willful evasion is inconsistent with surprised innocence." *United States v. Ragen*, 314 U.S. 513, 524 (1942). *See also United States v. National Dairy Corp.*, 372 U.S. 29, 33, 35 (1963); *Screws v. United States*, 325 U.S. 91, 103 (1945). The record here is clear that appellants were not the helpless victims of an unconstitutionally vague statute.[24]

III. *Jury Instructions*

A. *Nevada Statutes and Regulations*

Appellants contend that the court below erred in several respects in its instructions to the jury. Certain of these claims concern specific instructions relating to the Nevada statutes. Appellants' objections are based upon a misunderstanding of the government's legal theory of the case. Viewed as a whole, the court's instructions constitute a reasonable construction of §1952 and the Nevada statutes governing the licensing of gambling operations.

Appellants also argue that it was error to read to the jury, without explanation, N.R.S. §463.130.[25] But that section is a self-explanatory statement of Nevada legislative policy and is important in

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[23]While appellants contend that the instructions on specific intent were erroneous, we find no such error. See pages 17-18, *infra*.

[24]The question of vagueness was considered before Congress enacted §1952. Assistant Attorney General Herbert J. Miller, Jr., testified before the House Subcommittee that: "It can hardly be contended that the average American citizen does not know if he is engaged, for example, in 'any business enterprise involving gambling, liquor, narcotics, or prostitution offenses' • • •. Since the bill in addition would require proof of the requisite intent before a violation would be made out, I believe that the scope of H.R. 6572 in no way threatens the activities or rights of any persons other than the organized criminals at whom it is aimed." "Legislation Relating to Organized Crime," Hearings on H.R. 468 et al., Before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess., p. 336 (1961).

[25]See footnote 9, *supra*.

understanding the purpose and meaning of the other sections. These Nevada statutes form a unified legislative plan; particular sections cannot be fully understood without relating them to the entire statutory scheme. Therefore, under these circumstances, it was not error to read to the jury sections other than N.R.S. §§463.160 and 463.200, the two sections upon which the indictment and information were based.

N.R.S. §463.300, dealing with voting trust agreements, was also read to the jury. Appellants argue that this was confusing, since the court had earlier instructed the jury that the evidence presented had failed to establish a violation of §463.300. The court refused appellants' instruction which would have directed the jury to disregard all evidence concerning the voting trust agreement. In light of the court's specific instruction, no further instructions were necessary to prevent the jury from finding a violation of §463.300. It is also highly unlikely that reading that section in these circumstances confused the jury. *Cf. United States v. Lookretis*, 422 F.2d 647, 651 (7 Cir. 1970), *cert. denied*, 398 U.S. 904 (1970).

Although conceding that the court properly charged the jury that violations of the regulations of the Nevada State Gaming Commission could not constitute criminal offenses, appellants nevertheless assert that error was committed in instructing that such a violation could be considered as an act in furtherance of a conspiracy. This instruction was proper and necessary in that without it the jury might have thought that it had to disregard completely a violation of the regulations.

B. *Sending Statutes and Regulations to the Jury Room*

Appellants urge that sending the statutes and regulations into the jury room, especially without limiting instructions, was prejudicial error. This question is within the sound discretion of the trial judge. *United States v. Gross*, 451 F.2d 1355, 1358-1359 (7 Cir. 1971); *United States v. Bearden*, 423 F.2d 805, 813 (5 Cir. 1970), *cert. denied*, 400 U.S. 836 (1970). In this case, the statutes and regulations were extremely complex, and the trial judge may justifiably have believed that it would be better to give the jury the statutes and regulations rather than to have them attempt a

reconstruction from notes or from memory. In his effort to avoid confusion, the trial judge did not abuse his discretion.

C. *Reading Indictment and Information to Jury and Sending Copies to Jury Room*

Appellants argue that it was reversible error to read the indictment and information both at the beginning of trial and during the instructions. Given the extraordinary length and complexity of the trial, however, the trial court may properly have judged that a re-reading was required to avoid confusion.[26] The decision to read the indictment to the jury is within the sound discretion of the trial court, and we find no abuse of that discretion here.[27]

The court below also sent to the jury room copies of the indictment and information. That decision is also generally within the discretion of the trial judge. *United States v. Murray*, 492 F.2d 178, 193-194 (9 Cir. 1973); *Souza v. United States*, 304 F.2d 274, 280 (9 Cir. 1962). Appellants contend that they should have been advised before closing arguments that the court intended to send the information and indictment. *See Dallago v. United States*, 427 F.2d 546, 553 (D.C.Cir. 1969). We agree, but the failure to do so here is not prejudicial error.[28] Under all the circumstances of this case, especially the court's cautionary instruction on the use of the indictment and information and the detailed instructions on what could be considered evidence by the jury, we do not find that error prejudicial in any respect.

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[26]The indictment was first read on February 16, 1972, and re-read on April 19, 1972, an interval of more than two months.

[27]The court instructed the jury as to the indictment and information: "An Indictment or Information is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused." Reporter's Transcript, Vol. 43, pp. 8736-8737.

[28]In *United States v. Steed*, 465 F.2d 1310, 1316 (9 Cir. 1972), *cert. denied*, 409 U.S. 1078 (1972), the trial court sent the indictment to the jury room upon the request of the jury during its deliberations. Despite the objections of both counsel, the court held that decision was within its discretion. Counsel stipulated that a cautionary instruction could be affixed to the indictment that was to be sent to the jury. We do not read the case to require affixing such an instruction in all cases in which an indictment is sent to the jury.

D. *Specific Intent*

In claiming error in the court's instructions on specific intent,[29] appellants urge us to follow *United States v. Stagman*, 446 F.2d 489, 492-493 (6 Cir. 1971), and hold that specific intent to violate state law is an element of the offense under §1952. This Court, however, has previously approved an instruction similar to the one given in this case. *See Turf Center, Inc. v. United States*, 325 F.2d 793, 797 and n. 5 (9 Cir. 1963). Moreover, to the extent that *Stagman* requires proof that an accused under §1952 intended to violate state law *himself*, we find that it conflicts with the clear meaning of the language used in §1952. As the court in *Stagman* recognized, the intent required in the statute "refers to the entire phrase 'to • • • carry on • • • any unlawful activity.'" 446 F.2d at 492. That phrase does not require specific intent to facilitate an activity which the accused knew to be unlawful under state law. This interpretation, apart from its inconsistency with the literal terms of §1952, also supports the purposes of that statute in attacking organized crime by furnishing federal help to local authorities in their attempts to control such crime. It would not subject innocent persons to criminal jeopardy in travelling interstate since for a conviction, proof would be required at the least "that the defendant intended with bad purpose"[30] to facilitate the violation of state law.

Although the instructions on specific intent, viewed alone, could have been more precise, taking the instructions as a whole, they reasonably informed the jury that they had to find that appellants knew that what they were facilitating was an unlawful activity under state law.

E. *Advice of Counsel*

As an adjunct to their argument on specific intent, appellants claim that the court should have instructed the jury that reliance on advice of counsel could show a lack of specific intent. Given the

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[29]"[I]t is not necessary that the Government prove that the defendants knew that they were violating Nevada law. The specific intent which the Government must show is the intent to facilitate the carrying on of a business enterprise involving gambling in violation of Nevada law." Reporter's Transcript, Vol. 43, p. 8802. See also pages 8755-8757.

[30]446 F.2d at 494.

evidence in this case, the advice given by counsel was an insignificant factor in the criminal enterprise found by the jury; thus the court below did not err in refusing to give an "advice of counsel" instruction. *See United States v. Shewfelt*, 455 F.2d 836, 838-839 (9 Cir. 1972), *cert. denied*, 406 U.S. 944 (1972); *Bisno v. United States*, 299 F.2d 711, 719-720 (9 Cir. 1961), *cert. denied*, 370 U.S. 952 (1962).

F. *Kotteakos Instruction*

Appellants contend that they were entitled to a "multiple conspiracy" instruction following the principle of *Kotteakos v. United States*, 328 U.S. 750, 767-768 (1946). *See also United States v. Griffin*, 464 F.2d 1352, 1355-1357 (9 Cir. 1972), *cert. denied*, 409 U.S. 1009 (1972). Having carefully reviewed the entire reporter's transcript of trial and all documents in evidence, we find that there is no variance between the allegations of the indictment and information and the evidence presented at trial and that therefore the trial court did not err in not giving a "multiple conspiracy" instruction.

G. *Suppression of Evidence*

A letter from appellant Bellanca to Emprise Corporation was not produced by the defense in response to a grand jury subpoena because of a claim of attorney-client privilege. The court gave a general instruction on suppression of evidence, apparently in part on the basis that failure to produce the letter could be evidence of suppression.[31] Appellants also complain of the court's refusal to give an instruction on attorney-client privilege.

Even if the giving of the suppression of evidence instruction were error, we find that the weight of other evidence against appellants is such that the error could not have been prejudicial. The court below, moreover, had instructed the jury on the attorney-client privilege during the trial.[32]

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[31]See Reporter's Transcript, Vol. 35, pp. 6944-6948.

[32]The issue of attorney-client privilege arose during the testimony of Virgil Wedge. The court instructed the jury that: "There exists what is known as an attorney-client privilege and it says, in short substance, that when a man goes to a lawyer and tells him sometimes confidential matters

H. *Perjurer's Testimony*

Appellants also claim error in the court's failure to give a cautionary instruction on the testimony of a perjurer. Their initial proposed instruction referred to the witness, Maurice Friedman, as an admitted perjurer when in fact he had been convicted of perjury and had not pled guilty. Appellants submitted a revised instruction after the instructions conference substituting "convicted" for "admitted", but it was rejected as untimely. Even if this were error, which we do not find, any prejudice resulting from it was cured by the instructions given on prior inconsistent statements[33] and on the weight of the testimony of an informer.[34] These instructions sufficiently alerted the jury to the caution necessary in weighing the testimony of a witness like Friedman. *Cf. United States v. Evanchik*, 413 F.2d 950, 954 (2 Cir. 1969); *United States v. Ross*, 322 F.2d 306, 307 (4 Cir. 1963), *cert. denied*, 375 U.S. 970 (1964).

I. *Skimming*[35]

Appellants argue that the trial court committed error in not admonishing the jury during instructions that the prosecution's argument about "skimming" should be disregarded as unsupported by evidence and as not appearing in the indictment or information. Whatever prejudice to appellants could have resulted from the prosecutor's argument was cured by the trial court's painstaking instructions on the elements of the offenses charged. The trial judge

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that he would want to discuss with a professional man, that that lawyer has the duty of preserving those matters inviolate to public notice and to keep them confidential as long as his client wants him to do so." Reporter's Transcript, Vol. 13, p. 2511.

[33]"The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his previous testimony." Reporter's Transcript, Vol. 43, p. 8749.

[34]"The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against any of the defendants." Reporter's Transcript, Vol. 43, p. 8751.

[35]"Skimming" appears to mean misappropriation of casino funds through falsification of accounts by underreporting the funds flowing into the cashier's office and by unrecorded payments from the cashier's office.

read the language of the information and indictment to the jury and sent copies of them to the jury room. The jury was fully apprised of the charges against appellants; "skimming" was not one of them.

IV. *Prejudicial Publicity*

Appellants claim that they were prejudiced by the publicity given their case both before and during trial and that the trial judge failed to take adequate measures to detect and prevent that prejudice. The pretrial publicity consisted mainly of newspaper articles on the case.[36] These articles commented, for instance, upon the alleged ties of appellants to the Mafia and upon the "skimming" allegations of the prosecution.

Appellants also point to several incidents during trial which in their view also led to prejudicial publicity. Newspaper articles referred, for example, to evidence which had not been admitted linking appellants Zerilli and Polizzi to James Hoffa, the former Teamster official, in a prior attempt to invest in a Las Vegas casino. On another occasion a witness mentioned in the absence of the jury that during a previous recorded and transcribed conversation, he "had in mind" Zerilli and Polizzi when he used the terms "Mafia" and "Cosa Nostra." References to this comment appeared in the newspapers. Later a newspaper disclosed the court's ruling at a sidebar conference sustaining the prosecutor's objection to a question asking Polizzi to explain his testimony on cross-examination that he had been falsely accused by the Department of Justice of being in the Mafia.[37] The prosecutor had mentioned at that sidebar conference surveillance logs of Zerilli and Polizzi disclosing "the whole Mafia organization in Detroit," and the newspaper article referred to that comment. The motion picture *The Godfather* was released during the trial, and a local television personality discussed during his program the book and Zerilli and Polizzi and their alleged links to the Mafia. Finally, after the jury had reached

[36]Appellants also cite the book, *The Godfather*, as a factor, since its storyline includes the infiltration of Las Vegas gambling by Mafia figures.

[37]The newspaper apparently learned of the ruling when a reporter, without the government's authorization or knowledge, read its copy of the reporter's daily transcript in which the conference outside the presence of the jury was reported. Thereafter the government took action to prevent recurrence of such an event.

its verdicts, one juror allegedly told defense counsel that other jurors had read newspaper articles on the case during trial and that this had been "devastating to the defendants." Although this juror had been in the courtroom during a hearing on a motion for a new trial, the court refused appellants' request to have him testify but permitted defense counsel to file affidavits. The juror was subsequently unwilling to submit an affidavit, but defense counsel did file an affidavit purporting to state what the juror had said.

An accused has an unquestioned right to have jurors decide his guilt or innocence who are not biased by what has appeared in the media. In some instances prejudicial publicity before and during trial may be so obvious and overwhelming that an appellate court must overturn a conviction without delving into a detailed analysis of the possibility of prejudice and the judicial action taken to curb it. *See Sheppard v. Maxwell*, 384 U.S. 333, 349-352 (1966); *Estes v. Texas*, 381 U.S. 532, 542, 544 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963); *Irvin v. Dowd*, 366 U.S. 717, 725 (1961). After a review of appellants' evidence and arguments on this question, we do not find that the situation here reached that extreme, and therefore we do not find "bias or preformed opinion" which would require reversal as a matter of law. *Beck v. Washington*, 369 U.S. 541, 557 (1962); *United States v. Silverthorne*, 430 F.2d 675, 678 (9 Cir. 1970), *cert. denied*, 400 U.S. 1022 (1971). We must now determine the probability of prejudice in this case and whether the court responded adequately to curtail the chance of an unfair trial. *Marshall v. United States*, 360 U.S. 310, 312 (1959).

A. *Pretrial Publicity*

"[T]he trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. • • • [W]hen pretrial publicity is great, the trial judge must exercise correspondingly great care in all aspects of the case relating to publicity which might tend to defeat or impair the rights of an accused. The judge must insure that the voir dire examination of the jurors affords a fair determination that no prejudice has been fostered." *Silverthorne v. United States*, 400 F.2d 627, 637-638 (9 Cir. 1968). In a case of *substantial* pretrial publicity, the voir dire must not simply call for the jurors' subjective assessment of their own impartiality, and it must not be

so general that it does not adequately probe the possibility of prejudice. 400 F.2d at 638.

If this case were to be considered closely similar to *Silverthorne, supra,* in the seriousness of the question of prejudice from pretrial publicity, there is little doubt that the initial voir dire was not sufficiently probing to meet the *Silverthorne* standards. The trial judge's questions on pretrial publicity were limited to two questions addressed to the first prospective panel of jurors[38] and later questions addressed to an individual prospective juror.[39] The answers gave no indication of possible prejudice.

We find, however, that the pretrial publicity in this case was not substantial enough to have required the trial judge to interrogate the prospective jurors at length about it. The judge was aware of the publicity, and clearly it was his judgment that the pretrial publicity was not a significant danger to a fair trial.[40] His concern

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[38]"The Court: Have any of you heard anything about the facts of this case except what you have heard in this courtroom today?

"Prospective Jurors: No.

"The Court: I take it when you say you haven't heard of it that means you haven't read anything about it either. Is that correct?

"Prospective Jurors: That's right." Reporter's Transcript of Proceedings of February 15, 1972, p. J-87.

[39]"The Court: Have you heard anything about this case in the newspaper or radio?

"Prospective Juror Schadick: No.

"The Court: If you are a juror and you do hear something about it will you put aside whatever news that should attract your attention as quickly as you could without consuming it?

"Prospective Juror Schadick: Yes." Reporter's Transcript of Proceedings of February 15, 1972, pp. J-126—J-127.

[40]A trial judge in a noteworthy and controversial case cannot be expected to impanel jurors who have not heard about the case. "In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. • • • To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd,* 366 U.S. 717, 722-723 (1961).

seemed greater about the possible effects of publicity during trial. The pretrial publicity in this case does not resemble the situation in *Silverthorne v. United States*, 400 F.2d 627, 639 (1968). Unless a trial judge clearly has erred in his estimation of the action needed to uncover and prevent prejudice from pretrial publicity, an appellate court should not intervene and impose its estimate. The court closest to the situation can best evaluate the proper way to walk the difficult line between a vigorous voir dire to determine any possible bias and avoidance of creating bias by specific questions which add "fuel to the flames" in suggesting the presence of controversial issues. *Beck v. Washington*, 369 U.S. 541, 548 (1962). The court below did not abuse its discretion by the way it handled the question of pretrial publicity.

B. *Publicity During Trial*

When the possibility of prejudice from publicity arises during trial, the trial court has "the affirmative duty • • • to take positive action to ascertain the existence of improper influences on the jurors' deliberative qualifications and to take whatever steps are necessary to diminish or eradicate such improprieties." *Silverthorne v. United States*, 400 F.2d 627, 643 (9 Cir. 1968). See also *Gordon v. United States*, 438 F.2d 858, 872-873 (5 Cir. 1971), *cert. denied*, 404 U.S. 828 (1971), *rehearing denied*, 404 U.S. 960 (1971). The better practice, if there is a clear chance of prejudice, is for the court to interrogate each juror in camera about the possibly prejudicial publicity. *Silverthorne v. United States*, 400 F.2d 627, 644 (9 Cir. 1968); *Coppedge v. United States*, 272 F.2d 504, 508 (D.C. Cir. 1959). The trial judge carries a difficult burden. He is called upon to question the jurors, but repeated questioning could itself be prejudicial in inciting in the jurors "joint or individual curiosity and encourage attempts to read the very newspaper articles sought to be kept from their knowledge." *Silverthorne v. United States*, 400 F.2d 627, 643 (9 Cir. 1968). His very questions may disclose or accentuate controversial issues. Unless he has clearly abused his discretion, we shall uphold the trial judge's delicate estimation of the needs of the case of which he has firsthand experience.

During his initial voir dire of prospective jurors, the judge indicated that the jurors would not be sequestered but that they would

be expected to avoid hearing or seeing anything about the case.[41] One prospective juror was questioned about adherence to that admonition; she indicated that she would find it difficult to follow and was excused. Appellants argue that allowing the jurors to read newspapers with the admonition to avoid stories on the trial after glancing at headlines itself raised enough possibility of prejudice to require reversal. We disagree. The relevant questions are the nature of the headlines and the actions taken by the court to cure any possibility of prejudice.[42]

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[41]"The Court: I am not so sure that this will happen, but it may. There may be some newspaper attention given this case, or there may be some talk about it on the radio or television. If you are selected as a juror in this case I am going to admonish you that when you leave here and go to your home and pick up the paper, if you should pick it up and see something about this case I am going to admonish you to put the paper down right away and to read no more of that article, because I don't want anything coming to your attention other than that which is directed to you through the rules of evidence that we have and that will come from this courtroom.

"I will also tell you to blind yourself to the subject on TV and to deafen yourself to the subject on radio if it should happen.

"Are there any of you who if you were a member of the jury in this case would feel that you shouldn't have to obey such admonition at all, and 'I am going to read what I please and listen to what I want to'—would any of you be inclined to do that?

"Prospective Jurors: No.

"The Court: Would you understand that there is a compelling reason for this Court to ask you to insulate yourselves from other information that may come to you through newspapers or through other media about this case, you understand that there is a reason for my doing so?

"Prospective Jurors: Yes." Reporter's Transcript of Proceedings of February 15, 1972, pp. J-87 - J-88.

[42]Cases cited by appellants are readily distinguishable from this case. In *United States v. Rattenni*, 480 F.2d 195, 196 (2 Cir. 1973) (Clark, J.), a juror admitted "her prejudice against Rattenni on the remaining open charges against him as well as in all of the charges against his co-defendants". In *United States v. Thomas*, 463 F.2d 1061, 1062-1063 (7 Cir. 1972), a juror disclosed that certain jurors had "argued from" a newspaper article which they displayed during their deliberations and that several votes were required before all jurors decided to vote for conviction. In *Mares v. United States*, 383 F.2d 805, 809 (10 Cir. 1967), *cert. denied*, 394 U.S. 963 (1969), an article reported a withdrawn guilty plea and an excluded confession, probably the most conclusively prejudicial publicity possible, and the court took no steps to determine the jury's exposure to it.

Early in the trial on February 24, 1972, the court again admonished the jury to avoid any publicity about the case.[43] The very next day, after newspaper stories linking Zerilli and Polizzi to James Hoffa, the court undertook an in camera interrogation of each juror separately, in the absence of all defendants, counsel and other jurors. The judge asked whether they had read the the articles and whether they had seen or heard anything about the case in the newspapers, on television, or on the radio. He also gave them another general admonition. Nothing said by any of the jurors during this interrogation revealed a possibility of prejudice from the publicity.[44] We agree with appellants that it

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[43]"May I remind the jury once again about the earlier admonition about reading any publicity that may be in the newspapers about this case, or watching any news concerning this case on TV or radio. Please be mindful of the importance of the admonition that I have told you about concerning that." Reporter's Transcript, Vol. 6, p. 1319.

[44]The court gave a fair and complete report of the interrogation to the parties and counsel:

"One juror indicated that several days ago he heard on the Long Beach radio station that a jury had been selected in this case, but that he had heard nothing else on radio. All the other jurors indicated that they had heard nothing on radio or on TV about the case.

"Mr. Dewey said that he saw the Los Angeles Times in the jury room this morning, but as soon as he saw it he pushed it aside and did not read the paper at all.

"Mr. Ford stated that he had not read either of the articles, but that four or five days ago he saw an article in the paper saying that a jury had been selected in the case.

"Mr. Foss said that he saw the headline in last night's Herald Examiner, but that he did not read the article, and that he did not read the article in the Times.

"Each of the other jurors indicated that he or she had not read either of the articles and had heard nothing on radio or TV. This inquiry includes the alternates.

"I admonished each against reading any future articles and received the promise of each that he would not read any newspaper articles about this case or listen to any account of it on radio or TV.

"Each person was asked if anything had happened to this point to prejudice him or her against any defendant, and each indicated that nothing had.

"I see no reason at this point to declare a mistrial, but if any counsel desires to be orally heard on such a motion I will hear it at a later time in the day." Reporter's Transcript, Vol. 7, pp. 1348-1349.

would have been preferable to ask each juror about the newspaper carrying the Hoffa story which apparently was in the jury room, but each juror's other answers would have to be willful falsehoods if each had in fact read the article in the jury room. If the jurors had read the story, "[e]ven the most biased argument would be hard put to suggest that all twelve jurors, sworn to try the indictments fairly would deliberately break their oaths by remaining in the box, having read the items, instead of bowing out under the wise protection of the court and saving not only their dignity but their honor." *United States v. Carlucci*, 288 F.2d 691, 696 (3 Cir. 1961), *cert. denied*, 366 U.S. 961 (1961).

On March 9, 1972, after newspaper articles were published referring to appellants and their links to organized crime as discovered by United States Senate investigators, the court declined to question the jurors again, in the belief that new questioning could itself undermine the jury's belief in its own integrity.[45] On March 21, 1972, after the leak of the ruling at the sidebar conference, the court, having the opportunity to observe on a daily basis the demeanor of the jurors and after expressing his confidence in their ability to obey his admonitions, again declined to interrogate the jurors anew.[46]

On April 3, 1972, the trial court on its own motion conducted an in camera questioning of each juror.[47] Again defendants, counsel, and the other jurors were not present. He asked them generally whether they had read, seen, or heard anything in the media about the case. The jurors indicated that they had not. Appel-

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[45]"Now wouldn't you think that if you were on this jury and every second day I came to you and said, now you are not reading any newspapers, are you, wouldn't you think that I had little enough trust in the integrity of these jurors?" Reporter's Transcript, Vol. 16, p. 3152.

[46]"[M]y concern is with this jury and my concern is that your clients and the Government will get a fair trial in this case, and I have gone to the efforts that you have just described to admonish the jury time and again and to talk with them individually about their responsibility not to read the newspapers or any accounts of this trial from the newspapers, and I have reason to believe that they are going to obey that admonition because I have impressed upon them the importance of doing so." Reporter's Transcript, Vol. 24, p. 4711.

[47]Reporter's Transcript, Vol. 31, pp. 6008-6024.

lants argue that Juror Foss, whose family was keeping a scrapbook of articles concerning the trial, must have been exposed to publicity surrounding the case. Here is the record:

> "The Court: Mr. Foss, you will recall that some time ago I called the jurors in one at a time to ask them if they had read any newspaper articles about this case and because of the length of the trial I thought it wise to emphasize it again and to call them in to ask if they had read any newspaper articles about the case. Have you read any?
>
> "Juror Foss: No. My people cut the articles out of the paper before they give me the paper. Before they bring the paper to me in the morning they cut everything out. They have got it in a scrapbook somewhere.
>
> "The Court: And you will wait until the case is over before you read it?
>
> "Juror Foss: I won't read anything about the case.
>
> "The Court: That is fine.
>
> "Juror Foss: I will decide it on the facts in the courtroom." Reporter's Transcript, Vol. 31, pp. 6010-6011.

The argument is frivolous.

After the verdicts were reached, the trial judge questioned each juror separately in his chambers. He stressed on this occasion whether the term "Mafia" or related terms had been factors in the jury's deliberations.[48] It seems that the terms were discussed

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[48]The court's questions and each juror's response relating to the "Mafia" issue were as follows:

> "The Court: Now has anything, any mention of the word 'Mafia' or 'Cosa Nostra' or anything like that that may have happened during this trial brought about anything in your thinking that in your opinion led to these verdicts?
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> "Juror Dewey: No. We threw that out the first day we were in because, we brought it up in our minds whether anybody thought about it, I don't think they are on trial here for that, that is not the question of what we heard, the fact that somebody mentioned the name in there or something like that, there was no evidence to substantiate anything like that anyway, and that isn't what we looked at in there."
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> • • • • •
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> "The Court: All right. You said that on the first day you were in deliberation, as I understood you to say, that the jurors asked each other, did they?

briefly at the beginning of the jury's deliberations and once during a lunchtime, but the jurors agreed that those terms and issues had not been factors in their decisions. The judge also asked

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"Juror Dewey: No, I think it was just an informal thing, that we just said, we are going to go by the evidence and forget the statements that were made that didn't have any bearing on the case.

"The Court: And that would have included any reference to Mafia or Cosa Nostra?

"Juror Dewey: I dont think we got down and said the words, just to the effect that we will stick to the evidence and that was all."

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"The Court: Do you know that any mention during the trial of the words 'Mafia' or any related term had any effect upon the verdicts that were reached?

"Juror Ford: No, I don't think that that influenced anybody. I think a lot of times these people just think it is really fictional to a great degree, they think it is a bogeyman word and that it is not anything real, that it is exaggerated.

"The Court: Mr. Dewey tells me that at the outset during the deliberations there was some informal talk about whether any of these terms have influenced anybody or brought any trouble to this trial, and he seems to say that there was some general discussion about it so that you could kind of clear the decks on that right away, is that true?

"Juror Ford: Yes. They had, you know, some of them didn't even know what the term meant, what it was all about, some weren't familiar with it, some had heard of it but only in something that they had seen or heard."

• • • • •

"The Court: I am told that there was some discussion at the outset in the jury room by the jurors about these terms 'Mafia' and related terms and that you decided you were just going to have a discussion about it and get it out of the way.

"Juror Foss: I don't think that that had anything to do with the verdicts.

"The Court: There was the question I was going to ask, whether you think that any of these terms inflamed the jury members in any way. Do you think so?

"Juror Foss: No, I am sure they did not."

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[For the entire transcript of the interrogation of Juror Palmer, see footnote 50, *infra*.]

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"The Court: Do you think any mention of the words 'Mafia' or related terms had any influence at all on any of these jurors?

them about their exposure to the book and the motion picture *The Godfather*. Two jurors had read the book, but said that it

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Juror Beth: No, I don't think anybody even thought anything about it. I know I didn't. It didn't bother me a bit."

* * * * *

"The Court: * * * Now there was some discussion during the trial of the word 'Mafia' and related terms.

"Juror Daniels: Sure.

"The Court: Do you think that any discussion of that word adversely affected any of these defendants?

"Juror Daniels: No, your Honor, because we didn't even during the time of our deliberations, we never did, even the word 'Mafia' was not even entertained or brought forth."

* * * * *

"Juror Mirick: * * * [W]e threw out when we first went in there any talk of Mafia * * *.

"The Court: * * * Now do you think that the use of these words 'Mafia' and related words at all influenced any of these jurors?

"Juror Mirick: No, I am sure not."

* * * * *

"The Court: The word 'Mafia' and related terms were bandied about a little bit during the time of the trial. Do you think that that inflamed the jury in any way?

"Juror Hoeffler: No.

"The Court: Do you think that it had any adverse effect at all on any of these defendants?

"Juror Hoeffler: Would you say that again?

"The Court: Do you think that the use of that term 'Mafia' and so forth had any adverse effect on these defendants? Did any of you use it, we will say, against any of these defendants or use it in reaching your verdicts?

"Juror Hoeffler: No, sir."

* * * * *

"The Court: Now what about during the deliberations, during the course of the trial the word 'Mafia' came up and related terms to that also. Do you think that any mention of that had any adverse effect upon any of these defendants?

"Juror Stroops: No, sir. I don't think we—I know we didn't pay any attention. I think it was just in one thing, it was in Mr. Friedman's just one time, I think in his testimony it was just one time we seen it in the testimony. * * *"

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"The Court: There was during the trial the mention of the word 'Mafia' and some related terms. Do you think that that adversely affected any of these defendants?

had not influenced their decisions. He asked all but four jurors general questions about their exposure to newspaper, television, and radio publicity, again without any revelations of possible prejudice.

Finally, on June 12, 1972, at a hearing on a motion for a new trial, defense counsel told the court of juror Palmer's revelation that other jurors had been reading newspaper stories about the case and that it had been "devastating to the defendants." The court refused defense counsel's request for an immediate examination of jurors Palmer and Dewey who were in the courtroom, but stated that counsel could file affidavits on the matter. Palmer subsequently refused to submit an affidavit although defense counsel did submit two affidavits.[49] While it may generally be

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"Juror Montejano: No, your Honor. I think if anything it might have helped us to even try to be really applying ourselves and just go by the facts.

"The Court: Now some have said that at the outset of your deliberations that there was some discussion of the effect of these terms, 'Mafia,' and so forth in the jury room, and you decided to clear the decks concerning it in that manner.

"Juror Montejano: That is right."

• • • • •

"The Court: Do you think that the mention during the trial of the word 'Mafia' or any related such term did it have any adverse influence upon any member of this jury to your knowledge against any of these defendants?

"Juror McDonald: No, sir, absolutely not."

• • • • •

"The Court: There was a mention during the trial of the word 'Mafia' and some related terms. Do you think that anybody on this jury related any of these terms to any of these defendants?

"Juror Plant: No, sir.

"The Court: Did it in your opinion have any effect at all in the verdicts that were reached?

"Juror Plant: No, sir."

Reporter's Transcript, Vol. 46, pp. 8997-8998, 9000-9001, 9003, 9009, 9011, 9013, 9015, 9018, 9020, 9023, 9026.

[49]Counsel for appellant Zerilli submitted the following affidavit, dated June 16, 1972:

"William J. Weinstein, being first duly sworn, deposes and says:

• • • • •

"On June 12, 1972, prior to the commencement of the court proceedings in the morning on the motions for new trial, I saw Alfred

preferable for the trial court to allow such an examination of jurors in order to dispel any doubts as to the integrity of the jury's deliberations, such action was not required here. The trial judge, after having questioned juror Palmer on three seperate occasions during and immediately after trial in the privacy of his chambers, could understandably have been skeptical of such a belated attack on the jury's verdicts. The record is not barren on this point,[50] and the court could reasonably have found juror

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Palmer, one of the jurors at the trial of the above case, in the hallway outside the courtroom. We said 'hello' to each other, and I then talked to Agnar Wahlberg, one of the court reporters.

"A few minutes later I went into the courtroom. Mr. Palmer was then sitting in the courtroom. I said 'hello' to him again, and I remarked that the five days of deliberation of the jury indicated the dedicated work of the jury.

"I was about to walk to the counsel table, but before I could do so Mr. Palmer made substantially the following statement:

"'We tried to be conscientious. But the newspaper publicity of the trial was devastating to the defendants. You can't keep those jurors from reading the newspapers.'

"I then stopped and inquired about this, and I asked Mr. Palmer if he was referring to the Hoffa story.

"His reply was substantially as follows:

"'More than that. The jury was reading about the case every day.'

"Mr. Palmer further stated that he himself had not read the newspaper articles concerning the case during the trial, but that he had read them after the trial, and that he could now understand how many of the other jurors felt during the trial. He said he felt that the Los Angeles Herald-Examiner was more damaging than the Los Angeles Times.

"Mr. Palmer also stated that the people in his office work hard and then go to Las Vegas and lose their money, and that he thought this was wrong. I then asked him how he felt about horse racing, and he said he thought that horse racing was the same."

[50]In his first interrogation of the jurors, the trial judge asked Palmer about his own exposure to the media. Palmer answered that he had not read, seen, or heard anything about the case. Reporter's Transcript, Vol. 7, pp. 1330-1332. During the second voir dire, Palmer again failed to mention any problem with the publicity. Reporter's Transcript, Vol. 31, pp. 6011-6012. The post-trial interrogation of juror Palmer is set out in full below:

"The Court: Come in, Mr. Palmer.

"Juror Palmer: Thank you, sir.

Palmer's disclosure as reported by defense counsel unworthy of

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"I owe you an apology for being the black sheep, the only one that said yes when I should have said no.

"The Court: No apology needed at all.

"Juror Palmer: The count was seven to five and I still feel that if we had had another session we could have come out on it. [This reference is to the jury's failure to reach a verdict as to defendant Polizzi on Count 3 of the indictment. See p. 8987.]

"The Court: My purpose here now is to ask you some questions about the case. Do you think that anything happened outside of this courtroom during the trial of this case that in any way influenced the verdict in the case?

"Juror Palmer: Well, I will put it this way, not that I know of. As far as myself is concerned, no, but as to others I am not too sure.

"The Court: Yes, Now is there anything about that, that leads you to suspect that anything happened?

"Juror Palmer: Well, I would rather hesitatingly say no.

"The Court: Read that answer to me.

"(Record read.)

"Juror Palmer: I think you well know in your experience that when folks get together outside, going to lunch or something like that, you can't very well stop them from talking about it among themselves, you know what I mean, just among ourselves, and I think some of that was done but I don't want to accuse anybody of it.

"The Court: Yes. All right. Now do you think that anybody reached any decisions about the case before the case was turned over to the jury?

"Juror Palmer: I don't think so. None were expressed to me, no, sir.

"The Court: Mr. Palmer, there is a picture called The Godfather. Have you seen that picture?

"Juror Palmer: No, sir, I have not.

"The Court: Have you read the book by the same name?

"Juror Palmer: No, sir. In fact, I never heard of it until you mentioned it.

"The Court: Was there any discussion of either the picture or the book in that jury room?

"Juror Palmer: No, sir, not that I know of, not that I heard.

"The Court: Do you think that the mention during this trial of any of the terms such as 'Mafia' or related terms had any unfavorable influence on the verdicts that were reached?

"Juror Palmer: Well, to be frank and honest with you, I hope I won't get into trouble by doing so, I think some of that was mentioned during the lunch hour between some of the members of the jury.

"The Court: In what respect?

belief. Palmer's unwillingness to submit an affidavit strongly supports that judgment.[51]

"Juror Palmer: Well, it was just the fact that it came up during the trial, the Chief of Police of Detroit accused some of our defendants of being members of it, they threatened him with suit and the suit was never filed because they thought they couldn't win it, the defendants I mean. Do I make myself clear?

"The Court: Yes, I think so. What you are saying is that during a lunch hour that there was some discussion of the evidence, is that correct?

"Juror Palmer: I was told somewhere that that come out in the local papers during the trial, and I think that was discussed during the lunch hour between some of the members. I don't want to hold up my right hand an swear to that, your Honor.

"The Court: Did you hear it yourself?

"Juror Palmer: Indirectly, yes.

"The Court: What do you mean by 'indirectly'?

"Juror Palmer: Well, they were some distance away from me, that is what I think they were talking about, but I couldn't convict them of it, I heard the word 'Mafia' mentioned and that kind of thing, and that was all, but I don't think there was any prejudice to it as far as that is concerned because it was admitted it was not to be considered in the trial. It was, shall I say, outlawed.

"The Court: Do you think that anybody did consider that in the deliberations in this case?

"Juror Palmer: I don't believe so, no, sir.

"The Court: Any comment or any discussion about it in the deliberations?

"Juror Palmer: No, sir, nothing. I never heard the word mentioned during the deliberation time, no, sir.

"The Court: All right. I think those are the questions that I wanted to ask you. And thank you again.

"Juror Palmer: Let me say it has been a pleasure to work with you. I hope I get a chance to do it again.

"The Court: It has been a pleasure working with you.

"Juror Palmer: Thank you."

Reporter's Transcript, Vol. 46, pp. 9005-9008.

[51] A case cited by appellants in support of their contention that juror Palmer's revelations indicate jury bias is easily distinguished from this case. *United States v. Thomas*, 463 F.2d 1061, 1062 (7 Cir. 1972), involved the disclosure by a juror the morning after the jury had deliberated, and reached a verdict that jurors "who chose to vote for conviction argued from [a newspaper] article which they displayed and to which they repeatedly referred." Here Palmer's disclosure as reported by appellants' counsel came approximately six weeks after the verdict had been reached, and there were good reasons for disbelieving that disclosure.

In this case the problem of publicity was not insignificant, but it was a problem that was handled by proper judicial supervision. "The right to publish a prejudicial article does not carry with it the right of an accused to an automatic mistrial. Such an outcome would give to the press a power over judicial proceedings which may not be countenanced." *Mares v. United States*, 383 F.2d 805, 808 (10 Cir. 1967), *cert. denied*, 394 U.S. 963 (1969). After our detailed review, we cannot say that there is a serious possibility that the jury was influenced by considerations apart from evidence properly admitted at trial. The trial judge admonished the jury on at least four occasions to avoid publicity about the case. He interrogated the jurors individually three times. The fact that the jurors discussed the term "Mafia" and related issues does not in itself require reversal. *Cf. United States v. Lazarus*, 425 F.2d 638, 640-641 (9 Cir. 1970), *cert. denied*, 400 U.S. 869 (1970), *rehearing denied*, 400 U.S. 954 (1970). For appellants' arguments of prejudice and juror Palmer's disclosure to be true, the other jurors would in effect have committed perjury on several occasions and have entered into a conspiracy of silence. The trial judge found that incredible. We agree. "Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933) (Brandeis, J.). "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." *Holt v. United States*, 218 U.S. 245, 251 (1910) (Holmes, J.). No reversible error was committed in the trial court's handling of the question of prejudicial publicity; we do not find "that the probability of prejudice arose and was not eliminated." *Silverthorne v. United States*, 400 F.2d 627, 644 (9 Cir. 1968).

V. *Department of Justice "Mafia" List*

The United States Department of Justice in 1969 included appellants Zerilli and Polizzi on a list of known Mafia figures. See 115 Cong.Rec., Part 17, pp. 23440-23441 (August 12, 1969). Appellants contend that the presence of those names on that list was the motivating factor in the prosecution of this case and

also that the prosecution made several prejudicial comments, based upon appellants' alleged Mafia connections, to the grand and petit juries.

Their first point, that their inclusion on the "Mafia list" was the prime motivation for the prosecution, is not supported by anything in the record and is strongly contradicted by the testimony of three government officials prominent in this prosecution.[52]

The next contention, that the prosecution "poisoned" the grand jury proceedings by comments referring to the Mafia, is unsupported by the record or by the authorities appellants cite. The portions of the transcript of the proceedings before the grand jury which appellants quote in their opening brief are not evidence of grand jury bias. "Mafia" is mentioned by the prosecutor in one question. The possible use of force is the basis of four questions referring to appellant Shapiro. One witness is asked whether he is fearful or apprehensive as a result of his testimony. Appellants allege that the grand jury was "repeatedly told" of a prior arrest of appellant Zerilli; and the prosecutor commented on the alleged association of Zerilli and Polizzi with "tough guys, Italians, from New York."

Appellants have a difficult burden to satisfy in their challenge to the indictment. "An indictment returned by a legally

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[52]The Honorable W. Matthew Byrne, Jr., United States District Judge, and who was United States Attorney in Los Angeles during the initial stages of this case, testified that interviews with Maurice Friedman were "the basis for the commencement of the investigation and the commencement of grand jury investigation regarding the Frontier case." Reporter's Transcript, Vol. 48, p. 9224. He did not recall having ever seen the "Mafia list." Reporter's Transcript, Vol. 51, pp. 9824-9825. David Nissen, chief of special prosecutions in the organized crime and racketeering section of the United States Attorney's office in Los Angeles at the time, also testified that Friedman's information was the basis for the decision to convene a grand jury. Reporter's Transcript, Vol. 51, p. 10,031. He denied that the "Mafia list" played any role in developing his interest in beginning the prosecution. Reporter's Transcript, Vol. 52, p. 10,220. Wayne W. Hill, a special agent with the F.B.I., also testified that the Friedman interviews provided the basis for initiating the prosecution. Reporter's Transcript, Vol. 49, pp. 9412-9418. He too denied ever having seen the "Mafia list." Reporter's Transcript, Vol. 50, p. 9714.

constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Costello v. United States*, 350 U.S. 359, 363 (1956). A valid indictment does not require support by "adequate or competent evidence" 350 U.S. at 364.[53] *See also United States v. Calandra*, ___ U.S. ___ (1974). Appellants have not demonstrated a reasonable inference of bias on the part of the grand jury resulting from the comments of the prosecutor.[54] *See Beck v. Washington*, 369 U.S. 541, 545-549 (1962). "The quantum of evidence necessary to indict is not as great as that necessary to convict. If a grand jury is prejudiced by outside sources when in fact there is insufficient evidence to indict, the greatest safeguard to the liberty of the accused is the petit jury and the rules governing its determination of a defendant's guilt or innocence. And, if impartiality among the petit jurors is wanting, the cure is reversal by the appellate courts." *Silverthorne v. United States*, 400 F.2d 627, 634 (9 Cir. 1968).[55]

Appellants also argue that the "Mafia list" played an impermissible role in the trial. They refer, however, only to the comments of the prosecutor in closing argument that appellants "substituted the corporate resolution for the pistol."[56] Although it

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[53]The recent decision cited by appellants, *United States v. Estepa*, 471 F.2d 1132, 1137 (2 Cir. 1972), condemns the *needless* use o hearsay testimony before the grand jury and is irrelevant to appellants' claims.

[54]References to "Mafia" and "Italians" are certainly not per se prejudicial. *Cf. United States v. Lazarus*, 425 F.2d 638, 640-641 (9 Cir. 1970), *cert. denied*, 400 U.S. 869 (1970), *rehearing denied*, 400 U.S. 954 (1970).

[55]Those cases upon which appellants rely concerned prosecutor misconduct in arguments to the petit jury. *Berger v. United States*, 295 U.S. 78 (1935); *United States v. Cummings*, 468 F.2d 274, 277-278 (9 Cir. 1972); *Hall v. United States*, 419 F.2d 582 (5 Cir. 1969). This distinction does not justify, of course, prosecutor misconduct before the grand jury. See A.B.A. Standards Relating to the Prosecution Function, Approved Draft, 1971, §3.5(b). It does mean that it takes very substantial evidence of grand jury bias for an appellate court to reverse a conviction because of an indictment returned by an allegedly biased grand jury.

[56]"I think I told you at the outset that this is nothing more than sophisticated robbery, sophisticated theft. And these businessmen have

is unclear that these comments were related to the "Mafia list" in any event appellants have failed to demonstrate that the comments contributed to an unfair trial. The trial judge specifically inquired of each juror in camera in a post-verdict voir dire as to the influence on the jurors of terms such as "Mafia," with no indication that they had influenced the verdicts.[57]

VI. *Cross-Examination on Reputation*

Appellants argue that the trial court committed reversible error in allowing the prosecution to cross-examine Polizzi and Zerilli on their reputations. The government contends that the cross-examination was permissible as to Polizzi because he had opened the subject of his reputation on direct examination and as to Zerilli in order to impeach his testimony about why he could not be licensed.

"The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." *Michelson v. United States*, 335 U.S. 469, 479 (1948). Throughout the presentation of its case, the prosecution avoided raising the issue of the Mafia links of Zerilli and Polizzi in demonstrating that they could not themselves obtain licenses from the Nevada authorities. On direct examination Polizzi testified that the reason why he could not be licensed was that he had a "problem." He never described the specifics of this problem. These statements did not open the question of Polizzi's reputation for cross-examination. Appellants could reasonably have understood that references to Mafia links and reputation were to be avoided. The important point for the prosecution was that Polizzi had serious problems preventing him from obtaining a license and thus motivating him to acquire a hidden interest; what the specific problems were was not directly

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learned it is better to use a corporate resolution than a pistol." Reporter's Transcript, Vol. 43, p. 8683.

"In short • • • the principals have learned that a corporate resolution is more deadly and more effective than a pistol, and the changes of apprehension and proof are considerably more difficult." Reporter's Transcript, Vol. 39, p. 7995.

[57]See pages 29-32, *supra*.

relevant. The danger of prejudice certainly outweighed whatever slight probative value a more specific line of questioning may have had.

The government attempts to justify its cross-examination of Zerilli in terms of impeaching his testimony on the reasons why he could not be licensed. His testimony, however, really concerned what his attorney had told him were the reasons. Thus the government's impeachment was more directed at the attorney than Zerilli, unless it could have been shown that Zerilli was misrepresenting what the attorney had told him. With the probative value of the government's questioning on Zerilli's reputation at best speculative, it was eror to permit the government to begin a line of questioning with a high possibility of prejudice.

Though the court's rulings were erroneous, appellants were not prejudiced by them. The court questioned the jurors individually in camera after they had reached their verdicts on the influence of the Mafia issue and was satisfied that it had not been a factor in their decisions. We have found that he did not commit error in making that determination[58] and it precludes reversal on this issue.

VII. *Misconduct of the Prosecutor and Trial Judge*

Appellants cite many episodes of what they assert to be misconduct by the prosecutor, sanctioned by the trial judge, which deprived them of a fair trial. After having carefully reviewed each of these assertions, we do not find that they amount to a deprivation of appellants' right to a fair trial. No good would be served by a discussion of each of the points raised, but we shall discuss several representative claims.[59]

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[58]See pages 29-32, *supra.*

[59]Those points not discussed are appellants' contentions that the prosecutor misstated facts and evidence throughout the trial; that the court delayed too long in giving appellants' counsel opportunities to argue their objections to the prosecutor's conduct; that the prosecutor was allowed to argue law, and misrepresent the law, in his arguments to the jury; that the prosecutor improperly asked witnesses to "square" their testimony with that of other witnesses; that the prosecutor intentionally misrepresented to the court what he expected the testimony of a witness would be; that the exhibits were mishandled and that the jury may have had in the jury room exhibits not admitted into evidence; that side-bar con-

In his closing arguments, the prosecutor did make comments which could have conveyed the impression that appellants were violent individuals.[60] This question, however, is tied closely to the issue of the influence of the Mafia references on the jury. We have found that the court below carefully handled that issue,[61] and we find that these comments were not so prejudicial to appellants so as to require reversal of the jury's verdicts.

Appellants argue that the prosecutor gave his personal opinion of appellants' guilt to the jury and referred to the indictment in this case as supporting him. The prosecutor did mention the grand jury indictment, but he used it to rebut appellants' argument to the jury that the prosecutor was pursuing in effect a personal vendetta against appellants.[62] The reference to the in-

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ferences were audible to the jury mainly through the fault of the prosecutor; and that the trial judge changed certain "ground rules" to the prejudice of appellants. We have, however, carefully considered each of these points and, based upon our review of the entire record, find them to be without merit.

[60]"That is the good old fashioned Chicago type extortion." Reporter's Transcript, Vol. 39, p. 7983. This particular reference was to testimony in the record which indicated perhaps some potential for violence during the events in question in this case. See witness Friedman's testimony of his mysterious and rather frightening trip to Toledo, Ohio. Reporter's Transcript, Vol. 5, pp. 1084-1098. The comment was not proper, however. See also the comments quoted in footnote 56, *supra*.

[61]See pages 29-32, *supra*.

[62]Defense counsel had argued: "The thing that impressed me and rather frightened me was the display of overwhelming power of the Federal Government if one of their prosecutors gets a theory and takes after you." Reporter's Transcript, Vol. 42, p. 8391.

The prosecutor then argued: "• • • But Mr. Ball has made a statement that I must make one remark to. He says he is worried because a prosecutor gets you on a theory and a statute and he goes after you.

"Not true. Never has been true in the legal system in this country or the body of criminal law that has only been around for 550 years. Never has been true and it is not true during this trial.

"A grand jury passed on this indictment. Not Kotoske. When it is read to you, the judge will read, 'The Grand Jury charges'. Not Tom Kotoske." Reporter's Transcript, Vol. 43, p. 8692.

Earlier in his argument, the prosecutor had also referred to the indictment in trying to show that the government had been consistent in asserting a legal theory under §1952. See Reporter's Transcript, Vol. 43, p. 8680.

dictment in these circumstances does not constitute improper argument. *Cf. United States v. Cummings*, 468 F.2d 274, 277-278 (9 Cir. 1972); *Hall v. United States*, 419 F.2d 582, 587 (5 Cir. 1969). Moreover, the jury was instructed that the indictment and information were not evidence and were merely methods of accusing a defendant of a crime. Reporter's Transcript, Vol. 43, pp. 8736-8737.

On four occasions, in ruling on questions addressed to two government witnesses, the trial judge made comments that appear to vouch for the credibility of the witnesses. However, we cannot accept the appellants' assertions of prejudice. They did not object to any of the judge's statements, and they certainly knew how to object when they thought it important to do so. The error, if any, could easily have been corrected, had there been objection. For example, in one instance, at the end of the colloquy, the court said "• • • in any instance the jury is to draw no inference from the questions as bringing any thruthfulness to us." Reporter's Transcript, Vol. 2, p. 244. The court, moreover, instructed the jury not to assume from his comments during trial that he held particular opinions about the issues in question and that they were the sole judges of the credibility of witnesses and of the weight of evidence. *See United States v. Jackson*, 482 F.2d 1167, 1175-1176 (10 Cir. 1973); *United States v. Cunningham*, 423 F.2d 1269, 1276 (4 Cir. 1970).

Appellants contend that the trial court first received evidence, in the presence of the jury, on the question of the applicable Nevada law, rendering the matter one for the jury's decision, but then at the end of the trial took the issue away from the jury by instructing it as to the state law. The determination of the applicable state law in a case such as this is a question for the court. *Cf. United States v. D'Amato*, 436 F.2d 52, 54 (3 Cir. 1970); *United States v. Lyon*, 397 F.2d 505, 513 (7 Cir. 1968), *cert. denied*, 393 U.S. 846 (1968). To receive testimony on the question of state law in the presence of the jury is unnecessary, but not prejudicial error unless the combination of the testimony and the court's instructions clearly leave the jury in confusion or in doubt as to the applicable state law. We do not find prejudicial error here.

Also cited as error is the trial court's comment that a certain question could be decided if one of the appellants took the stand.[63] This was not an infringement of appellant Bellanca's right against self-incrimination. "[T]he test is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Knowles v. United States*, 224 F.2d 168, 170 (10 Cir. 1955).[64] No such finding could be reached here. It was an offhand comment which could have had no influence on the jury. This point is an example of a practice appellants have followed many times on this appeal: quoting out of context remarks of the prosecutor and especially the trial judge and supplying an "argument" for reversal by dramatic and hyperbolic language. Appellants argue that after this incident "appellant Bellanca had to take the stand or suffer the possibility of an untoward inference by the jurors." The episode in fact was a pedestrian exchange which, if anything, probably left the jury with the impression that appellants would be able to establish the point through other witnesses, including appellant Bellanca if he testified.

Appellants' next point is that the prosecution evaded a prior ruling by the court that it could not offer evidence of prior similar acts by appellants. The court, after hearing the proffered evidence in the absence of the jury, instructed the jury that there was no evidence of prior similar acts and that any comments of the prosecutor on the issue were to be disregarded. In addition, each juror was asked whether the comments had prejudiced them, and each juror said that he had not been prejudiced.

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[63]"The Court: I understand what you are trying to show, but I don't know how you can show it by establishing—you are not able to establish the foundation for this document by this witness, as I see it. You may be able to establish it by some other witness, or if your brother takes the stand and testifies you can establish his whereabouts by his testimony.

"Mr. James Bellanca: Then I will withdraw it and save it until then, your Honor." Reporter's Transcript, Vol. 9, p. 1678.

[64]*See also United States v. Biondo*, 483 F.2d 635, 644-645 (8 Cir. 1973); *United States v. Mahanna*, 461 F.2d 1110, 1113-1115 (8 Cir. 1972); *United States v. Porter*, 441 F.2d 1204, 1216 (8 Cir. 1971), *cert. denied*, 404 U.S. 911 (1971); *Davis v. United States*, 357 F.2d 438, 440-441 (5 Cir. 1966), *cert. denied*, 385 U.S. 927 (1966).

The prosecution nevertheless subsequently inquired on cross-examination about prior attempts to invest in Las Vegas. This line of inquiry was permitted by the court for the limited purpose of showing Zerilli and Polizzi's earlier interest in investing in a Las Vegas casino. However, the probative value of that testimony was not great enough to justify its admission in light of the possibility of confusing the jury which in effect was asked to consider the evidence on one issue but not on another, although the issues of motive and prior similar acts, if not identical, were closely related. We do not find, however, that prejudice to appellants actually resulted in light of other and substantial evidence supporting the verdicts.

The government attempted to use a deposition of Benjamin Reisman, an attorney employed by appellant Emprise, on its redirect examination of Maurice Friedman. The deposition was taken in 1970, before appellants were indicted, during the course of other legal proceedings. Appellant Rooks was later asked on cross-examination by the prosecution whether he had heard the reading of the deposition and whether he knew of the events described in the deposition. On cross-examination of appellant Zerilli, the prosecutor used the deposition again in an attempt to refresh Zerilli's recollection.

The use of the deposition cannot be justified by Rule 15 of the Federal Rules of Criminal Procedure since it was not taken at the motion of a defendant, it was taken before the indictment and information here were filed, no order of the court had been obtained, and no notice had been given to the parties. The prosecution argues that it offered the evidence only as to the corporate defendant Emprise. The deposition was taken in connection with legal proceedings against Jeremy Jacobs, the President of Emprise. The court admitted it not on the authority of Rule 15, but rather on the ground that it was a prior statement of a witness in a case where the parties and issues were substantially the same as in the present case. We need not decide whether there was error.[65] Another deposition of Reisman was

[65] We disagree with the government's view that appellants' objection to admitting the deposition was withdrawn when it was agreed that another deposition of Reisman would be taken. The court had made its ruling, and defense counsel then asked about the possibility of taking another deposition.

taken and read into the record without objection, thereby curing any defect arising from the admission of the first deposition. Appellants' counsel had the opportunity to ask Reisman about his prior statements, thus fulfilling appellants' right to confront adverse witnesses.

If it were error to allow the prosecution to ask appellant Rooks about the first Reisman deposition, there was no possible prejudice.[66] The same is true of the use of the deposition as possibly refreshing Zerilli's memory; the incident was insignificant.[67]

The prosecution, as the representative of the government, is expected to follow high standards in conducting its case. "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). But during an extensive and fiercely contested trial, we cannot realistically expect perfection. *Cf. Lutwak v. United States*, 344 U.S. 604, 619 (1953). Upon hindsight, there were things said by the prosecution which would have been better unsaid. But nothing said or done deprived appellants of a fair trial.

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[66]"Q Did you hear the reading of the Ben Reisman deposition that that happened in the spring?

"A No, I don't recall hearing that." Reporter's Transcript, Vol. 24, p. 4602.

[67]"Q Mr. Zerilli, does that refresh your recollection whether or not you went up to Emprise or Sportservice to speak with either Mr. Lou Jacobs or Ben Reisman about the Rooks and Kachinko loan, prior to April 4, 1966?

"A It does not refresh my recollection. I did not go to Buffalo and talk to them about the Alex Kachinko and Art Rooks loan.

"Q Do you recall the testimony, Mr. Zerilli, of Mr. Friedman during this trial indicating that you were there on that occasion?

"A I recall the testimony, yes.

"Q Are you saying that it was inaccurate and not true?

"A Yes, sir, much of it.

"Q How about this point, was it not true?

"A This point was not true, no, sir." Reporter's Transcript, Vol. 26, p. 5211.

The main instrument for insuring that the conduct of counsel does not deprive the accused of a fair trial is the trial judge. In this case the trial judge clearly did his best to give appellants a fair trial. *Compare United States v. Dellinger*, 472 F.2d 340, 385-391 (7 Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). Errors were committed, but none so prejudicial, so fatal, either individually or collectively, as to require reversal. "[F]ew, if any judges can altogether avoid words or action, inadvertent or otherwise, which seem inappropriate when later examined in the calm cloisters of the appellate court. But unless such misadventures so persistently pervade the trial or, considered individually or together, are of such magnitude that a courtroom climate unfair to the defendant is discernible from the cold record, the defendant is not sufficiently aggrieved to warrant a new trial." *Smith v. United States*, 305 F.2d 197, 205 (9 Cir. 1962), *cert. denied*, 371 U.S. 890 (1962). Appellants have failed to make a persuasive showing that their constitutional rights were violated, and our careful review of the entire record does not lead to a reasonable inference that the jury's verdicts were the end result of anything other than an impartial consideration of properly admitted evidence.

VIII *Production of Jencks Act Statements*

Appellants claim that the prosecution's failure to produce four pretrial statements by its witness, Maurice Friedman, in conformance with the Jencks Act, 18 U.S.C. §3500, requires a reversal. Two of the purported statements are interview memoranda prepared by an assistant United States Attorney; another is a report by an F.B.I. agent of one of the interviews; and the last is the transcript of a tape recording of a conversation between Friedman and one Dr. Victor Lands. The two interview memoranda and the "Lands transcript" were disclosed to appellants after Friedman's cross-examination had begun.

The two interview memoranda and the F.B.I. report are not Jencks Act statements. A written statement falls within that statute only if it is "made by said witness and signed or otherwise adopted or approved by him." 18 U.S.C. §3500(e)(1). The record shows that Friedman had not signed, adopted, or approved these three written reports. The government attorney who wrote

the memoranda took no notes during the interviews and testified that the memoranda were his summaries, conclusions, and interpretations of what Friedman had said. It does not appear that the F.B.I. report differs in these respects. The rationale of the Jencks Act is to provide the defense with material that could impeach a government witness. "We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced." *Palermo v. United States*, 360 U.S. 343, 352-353 (1959). *See also Campbell v. United States*, 373 U.S. 487 (1963); *Rosenberg v. United States*, 360 U.S. 367, 369 (1959); *Wilke v. United States*, 422 F.2d 1298, 1299 (9 Cir. 1970).

The Lands transcript presents a more difficult question of construing the Jencks Act, a problem which we find unnecessary to resolve in this case.[68] Assuming for the purposes of argument that it should have been disclosed, we find that the untimely disclosure here was not prejudicial to appellants. Disclosures are required by the Jencks Act only for impeachment purposes.[69] *Palermo v. United States*, 360 U.S. 343, 345 (1959); *United States v. Harris*, 458 F.2d 670, 677 (5 Cir. 1972); *cert. denied*, 409 U.S. 888 (1972). The material in the Lands transcript could not have been used to impeach Friedman's testimony on direct examination. Though a question of inconsistency perhaps did arise with Friedman's testimony on cross-examination, appellants did then have the transcript. Indeed Friedman was questioned about it on recross-examination.[70] *Cf. United States v. Scaglione*,

[68]Prior to 1970, the Lands transcript would clearly not have been within the Jencks Act. 18 U.S.C. §3500(e)(2) then included only statements made "to an agent of the Government." The 1970 amendment eliminated that phrase, but the brief legislative history gives no hint of the Congressional intention behind the change. 2 U.S. Code Cong. & Admin. News 4017 (1970).

[69]Thus appellants' additional complaint of prejudicial surprise with respect to one of Friedman's answers on cross-examination, that he had told someone several years before of hidden interests in VFI, has no merit under the Jencks Act since that Act was not intended to protect against surprise but rather for impeachment purposes.

[70]See pages 49-53, *infra*.

446 F.2d 182, 184 (5 Cir. 1971), *cert. denied*, 404 U.S. 941 (1971). The prosecution is obligated to disclose to the defense statements falling within the Jencks Act regardless of anyone's perception of the utility of the statements for impeachment. But if, upon review, a failure to disclose appears clearly to be harmless and is not a willful avoidance and egregious dereliction of the prosecutor's statutory obligation, then a court need not invoke the drastic remedies of striking testimony or calling a mistrial as provided by 18 U.S.C. §3500(d). *Cf. United States v. American Radiator & Stand. San. Corp.*, 433 F.2d 174, 203 (3 Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Pierce v. United States*, 414 F.2d 163, 169 (5 Cir. 1969), *cert. denied*, 396 U.S. 960 (1969).

IX *The Lands Transcript*

The Lands transcript is a transcription of a tape-recorded conversation between Maurice Friedman and one Dr. Victor Lands in 1967. During that talk, Friedman said in reference to the attempt to secure a Nevada gambling license for VFI:

> "There are thirty-two people who have invested three and a half million dollars coming before this Commission, all of whom have been approved at least by a majority of this three-man Board. I told you that we feel pretty good except that our lawyer is very, very nervous, and he understands through the grapevine that we are going to have one hell of a time—the thirty-two of us. The Mafia, Casa [*sic*] Nostra—everything's going to come out. This is a public hearing. The press will know."

On cross-examination Friedman testified that he had stated in 1967 that there were hidden interests in VFI. The court then ordered the prosecution to disclose the Lands transcript. With the jury absent, Friedman verified the accuracy of the transcript. He said that in using the terms "Mafia" and "Cosa Nostra" he was referring to appellants Zerilli and Polizzi. He also testified that he was referring to hidden interests in VFI when he said to Lands "everything's going to come out." Upon objection by the defense, the transcript was not admitted as evidence, but the court did permit testimony about the Lands conversation. The court, in an understandable effort to avoid any possible prejudice to appellants Zerilli and Polizzi, ordered

Friedman not to use the terms "Mafia" and "Cosa Nostra" in his testimony before the jury. On redirect examination, Friedman testified that he had mentioned to Lands that Zerilli and Polizzi held hidden interests in VFI. On recross-examination Friedman admitted that in the Lands conversation he had not used the words "hidden interests" nor referred specifically to any of appellants.

Although the trial court clearly had the best of motivations in its handling of the Lands transcript question, preventing prejudice to appellants from the use of the terms "Mafia" and "Cosa Nostra," it did commit error. Because of the vagueness of the terms used, the probative value of the Lands transcript in this case was insubstantial and was clearly outweighed by the possible prejudice arising from the terms "Mafia" and "Cosa Nostra" and, in an attempt to eliminate that possibility, by the danger of allowing testimony deviating from and therefore misrepresenting the actual terms used in the transcript. The court thus should not have admitted any testimony referring to the Lands transcript.

Appellants argue that they were seriously prejudiced by this error. They characterize this episode as a purposeful distortion of the Lands transcript, a falsification of the record, which resulted in the admission of testimony which is conclusively demonstrated to be false by the transcript itself and admitted to be false by the witness. We disagree. The trial court did not order Friedman to substitute "Zerilli" and "Polizzi" for "Mafia' and "Cosa Nostra." Friedman was instructed only not to use the latter terms. At most the witness may have misunderstood the court as suggesting such a substitution.[71] Moreover, the Lands transcript did not contradict Friedman's testimony, as appellants

[71] "The Court: Now, Mr. Friedman, it is my purpose to avoid your use of either of those terms ['Mafia' and 'Cosa Nostra'] in the hearing of the jury.

"Mr. Friedman: I understand, sir.

"The Court: Because of the possible prejudices that might result.

"The Witness: Yes, sir.

"The Court: Do you understand that you are not to use either of those terms in any reference that you are called upon to make when referring to this document?

"The Witness: I understand, sir.

argue. Nor did it confirm that testimony, as the government urges. The Lands transcript and Friedman's testimony were simply not expressly inconsistent. Friedman could, as he did in the absence of the jury, have commented on what he meant by some of the terms he had used in talking to Lands. If he had been permitted to say to the jury that, in using "Mafia" and "Cosa Nostra", he was referring to Zerilli and Polizzi, his testimony would clearly have had a strong impact on the jury adverse to appellants. As it was, his testimony was less precise on this point[72] and was heavily qualified on recross-examination.[73] In light of the substantial evidence in the record supporting appellants' convictions, we do not find that the error in handling the Lands transcript was so prejudicial as to require reversal.

"The Court: Is there a manner that you can state names that you intended referring to at the time you were speaking in this document for those offensive words?

"The Witness: The gentlemen that I understood were Mr. Shapiro's associates, yes, sir." Reporter's Transcript, Vol. 10, pp. 1981-1982.

[72]"Q Isn't it a fact that you told Dr. Lands on that date that certain hidden interests in that casino were going to come out?

"A Words to that effect, yes, sir.

* * * * *

"Q When you used the phrase 'hidden interests,' talking to Dr. Lands, to whom did you refer?

"A To Mr. Shapiro's partners from Detroit.

"Q Who?

"A Mr. Zerilli and Mr. Polizzi." Reporter's Transcript, Vol. 10, p. 2000.

[73]"Q So that to put it right on the line, Mr. Friedman, you weren't trying to tell Dr. Lands that there was a hidden interest in the Frontier Hotel, were you?

"A No, I was trying to tell Dr. Lands why I was investigated in the Friars Club case.

"Q And you weren't trying to tell Dr. Lands, were you, that either Mr. Polizzi or Mr. Zerilli had any hidden interest in the Frontier Hotel, were you?

"A No, I wasn't.

"Q And, in fact, you did not mention hidden interest or Mr. Polizzi's name or Mr. Zerilli's name or Mr. Shapiro's name or any of those defendants' names in your conversation with Dr. Lands, is that correct?

"A No, I didn't sir.

"Q And you didn't intend to mention any of their names to Dr. Lands, did you?

"A No, sir." Reporter's Transcript, Vol. 10, p. 2036.

We find that, in light of all of the evidence of record, appellants also did not suffer prejudice from the government's argument to the jury concerning the Lands transcript, and that the court's response to the jury's request for a reading of the testimony about the Lands conversation was not an abuse of its discretion.[74] *United States v. Baxter,* 492 F.2d 150, 175 (9th Cir. 1973); *United States v. De Palma,* 414 F.2d 394, 396-397 (9 Cir. 1969), *cert. denied,* 396 U.S. 1046 (1970).

X. *Concealment of Prosecution Promises of Leniency*

Appellants contend that the prosecution failed to disclose its agreements with or promises of leniency to its key witness, Maurice Friedman, as required by *Giglio v. United States,* 405 U.S. 150 (1972). Friedman, serving prison sentences concurrently for three federal convictions, had his sentences modified after appellants' convictions and was released from prison. The prosecution did disclose a promise to Friedman that his testimony in this case would be called to the attention of the Parole Board, but maintained that no other promises were made. Appellants argue that the prosecution did also promise to urge the reduction of Friedman's sentences and stipulated that Friedman's motions for

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[74]The court did not deny the jury's request. The jury did not renew its request after the court gave its cautionary remarks:

"Before I agree to having it reread to you, I want to be certain that a rereading of any testimony is deemed important by the jury at this time to assist you in your deliberations. The reason for that is that we like very much to have you depend upon your own memory of the evidence and testimony in this case and not to have any testimony reread. We feel that to pick out certain portions of the testimony is very probably to unduly emphasize that testimony. At the same time I can conceive that a situation may have arisen during your deliberations that makes you feel rather compelled that the testimony on certain portions of the testimony ought to be reread to you, and if you feel that you would be assisted in your deliberations by a rereading of the testimony I will order that it be done.

"On the other hand, if you feel that you can continue with your deliberations successfully without a rereading of any of the testimony and depending upon your memory of it, I would prefer that, and I think counsel would too." Reporter's Transcript, Vol. 46, pp. 8963-8964.

Appellants' counsel also object to the implication arising from the court's statement that defense counsel concurred in the court's preference. That the court's comment could have had some profound impact on the jury is frivolous speculation.

modification of sentence could remain submitted but undecided until after the trial in this case.[75] Appellants, however, do not argue that express agreements were reached, but rather that there was an implicit mutual understanding that the prosecution would try to help Friedman.

Having reviewed the arguments and evidence presented by appellants on this point, we do not find that they establish undisclosed promises by the prosecution.[76] More importantly, however, even if undisclosed promises had been made, appellants would not have suffered prejudice as a result of the prosecution's dereliction.[77] The prosecution did disclose a promise to inform the Parole Board of Friedman's testimony. This disclosure alerted the defense and the jury to the possibility that the testimony was motivated by self-interest. *Cf. United States v. Sidman*, 470 F.2d 1158, 1165 (9 Cir.

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[75]Appellants contend that the federal judges who modified Friedman's sentences violated Rule 35 of the Federal Rules of Criminal Procedure. Appellants' position is unmeritorious. This Court, in a decision construing Rule 35 in its form prior to amendment in 1966, ruled that it required a motion for reduction to be made within 60 days and not final action on the motion within that time. *Leyras v. United States*, 371 F.2d 714, 719 (9 Cir. 1967). The 1966 amendment increased the time limit to 120 days. There is authority for appellants' position that the 120-day limit also applies to judicial action. *Cf.* 8A J. Moore, Federal Practice ¶35.02[2], p. 35-6, n. 10.1 (2d ed. 1973). We do not feel, however, that the amendment necessitates a change in the *Leyras* ruling. *See Irizzary v. United States*, 58 F.R.D. 65, 67 (D.Mass. 1972): "The 120 day period is technically not the time within which the motion may be made, but is rather the time within which the court may act. • • • However, as a matter of practice, the requirement has been interpreted to permit a court to act upon a motion as long as the motion is made within that period."

[76]The evidence consists of the government's stipulations in continuing the motions for modification and the modifications after appellants' convictions, a statement during a post-trial hearing in this case by Assistant U.S. Attorney Nissen that he had told Friedman's attorney that Friedman's cooperation would be called to the attention of "the court or whatever appropriate authority it would be" (Reporter's Transcript, Vol. 51, p. 10,173), and the affidavit of Friedman's former custodian that Friedman had told him that the government had said that Friedman would be released after testifying in this case.

[77]Failure to disclose such promises will not require reversal unless it is reasonably likely that the jury's judgment would have been affected by disclosure. *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Napue v. Illinois*, 360 U.S. 264, 271 (1959).

1972).[78] The trial court then instructed the jury specifically on carefully weighing the testimony of "an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication."[79] Defense counsel did cross-examine Friedman about his motive for testifying. Finally, the pending motions for modification of sentence were public records, available to the defense, and could have been the basis for cross-examining Friedman.

I concur in the portions of this opinion prepared by Judges Browning and Duniway.

BROWNING, Circuit Judge:

I concur in the portions of this opinion prepared by Judges Renfrew and Duniway.

XI. *Unitary Crime Contentions*

Appellants argue that "this case concerns a unitary event—the maintenance of Vegas Frontier Inc. from July 27, 1967 to November 27, 1967," and therefore conviction and punishment on a count charging conspiracy and several counts charging substantive offenses was improper.[1] The argument includes two propositions: that Congress did not intend to make conspiracy to violate 18 U.S.C. §1952 a separate crime from the substantive offense; and that Congress did not intend to allow prosecution as a separate offense of each of several acts of travel where the illegal intent

[78]This point is not inconsistent with *Napue v. Illinois*, 360 U.S. 264, 268, 270-271 (1959). There the jury was told, contrary to fact, only that an unidentified lawyer from the public defender's office, not a state representative, had promised to help the witness. Here the prosecution disclosed that it would help the witness.

[79]See footnote 34, *supra*.

[1]The argument does not apply to Emprise Corporation, Rooks, or Giordano, who were each charged and convicted only of conspiracy. The other four defendants were each convicted and sentenced for conspiracy and more than one substantive count. The jail terms were concurrent, but separate fines were imposed on each defendant on the conspiracy count and at least one substantive count. Therefore, each of these defendants was affected adversely by the separate convictions, and the concurrent sentence doctrine is not applicable. *See* Benton v. Maryland, 395 U.S. 784 (1969); United States v. Tucker, 435 F.2d 1017 (9th Cir. 1970).

during each act related to the same unlawful activity. Neither proposition has merit.

A.

"The distinctiveness between a substantive offense and a conspiracy to commit it is a postulate of our law. 'It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses.'" *Callanan v. United States*, 364 U.S. 587, 593 (1961), *quoting Pinkerton v. United States*, 328 U.S. 640, 643 (1946). Accordingly, unless there is specific language to the contrary, Congress presumably intended to permit punishment as separate offenses of both the substantive crime and a conspiracy to commit it. 364 U.S. at 594-95. There is no such language here, in either the statute[2] or legislative history.[3]

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[2]*See* pages 5-6 *supra* for a discussion of the statute.

[3]There is no constitutional bar to separate convictions and sentences for the substantive offenses defined by § 1952 and for conspiracy to commit that offense. Nolan v. United States, 423 F.2d 1031, 1047-48 (10th Cir. 1970). "Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy." Pereira v. United States, 347 U.S. 1, 11 (1954). An agreement or common course of conduct among two or more persons is not an essential element of the substantive offense under § 1952: The travel required by § 1952(a) might be accomplished by only one person, and the "business enterprise" required by § 1952(b)(1) also might be conducted by an individual. True, both the legislative history (*see* United States v. Roselli, 432 F.2d 879, 886 n.8 (9th Cir. 1970)), and case law (*see, e.g.*, United States v. Donaway, 447 F.2d 940, 944 (9th Cir. 1971)) indicate that § 1952 is not directed against casual and isolated instances of illegal conduct. But neither suggest that the substantive crime requires the participation of a group of people.

Further, the conspiracy alleged here is not merely an agreement to violate state law but an agreement to travel interstate with the intent to promote certain violations of state law. It is distinct from the joint activity that might be involved in running the business enterprise mentioned in § 1952 even if the "business enterprise" language were construed to require more than a sole proprietorship.

Nor is there any constitutional bar to conviction for both conspiracy and 18 U.S.C. § 2, the aiding and abetting statute underlying the conviction of some of the defendants on some of the substantive counts. United States v. Valencia, ... F.2d ....., ... (9th Cir. Feb. 1, 1974); Pereira v. United States, 347 U.S. 1, 11-12 (1954).

B.

Turning to the second proposition, the language of the statute seems unambiguous. The offense defined is an act of travel or use of an interstate facility, with the requisite intent, plus subsequent performance of another act of the kind specified in the statute. Appellants argue, however, that the legislative history indicates that section 1952 was directed at a "course of conduct," and therefore various acts of travel in furtherance of a single "unlawful activity," 18 U.S.C. §1952(b), should be held to constitute only one crime. But "the 'course of conduct' referred to in the . . . legislative history of Section 1952 refers to the nature of the business promoted or facilitated—and not to the essence of the federal offense, which is 'travel.'" *United States v. Teemer*, 214 F. Supp. 952, 958 (N.D. W.Va. 1963),[4] *quoted with approval* in *Katz v. United States*, 369 F.2d 130, 135 (9th Cir. 1966).

No appellate court appears to have discussed the proper unit of prosecution under section 1952,[5] but similar federal statutes making it a crime to use interstate transportation or communications facilities in aid of illegal purposes have been construed to permit prosecution of each use of such facilities as a separate offense. *See, e.g., Sanders v. United States*, 415 F.2d 621, 626-27 (5th Cir. 1969); *Katz v. United States, supra*; *Mitchell v. United States*, 142 F.2d 480 (10th Cir. 1944). The cases upon which appellants rely (*Brav-*

[4]Judge Paul continued, 214 F. Supp. at 958:

> The phrase seems to refer to the fact that the Act was designed to attack an entrenched operation rather than a sporadic poker game or a floating crap game. No act of travel is to be deemed unlawful unless the enterprise is a continuing one; but once the continuity of the enterprise is established, any act of travel, with the requisite intent and the subsequent participation, would seem to be a separate offense, even if the travel is a daily or regular event, and thus, perhaps, a "continuing" activity. If this is the plain and literal meaning of the Act, it is within the power of Congress to make each act of travel a unit of prosecution. See, e. g., Mitchell v. United States, 142 F.2d 480 (10 Cir., 1944); and this, in spite of the distinguishable cases of United States v. Universal CIT Credit Corp., 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (1952) and Bell v. United States, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955).

[5]Separate convictions and sentences for individual acts of travel in violation of 18 U.S.C. § 1952 have been affirmed without discussion of the issue raised here. *See, e.g., United States v. McGowan*, 423 F.2d 413, 416 (4th Cir. 1970).

erman v. United States, 317 U.S. 49 (1942); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952); *Bell v. United States*, 349 U.S. 81 (1955); and *Rewis v. United States*, 401 U.S. 808 (1971)) are inapposite.[6]

In view of the plain import of the language of section 1952, the absence of any contrary indication in the legislative history,[7] and the construction given comparable statutes over the years, we conclude that each act of travel may be treated as a separate violation of section 1952.

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[6]The issue in *Braverman* was whether a single agreement to commit several criminal acts constituted one or several conspiracies. In the present case only one conspiracy was charged. *Bell* held that a single act of transporting two women interstate at the same time was one violation of the Mann Act. In the instant case, each substantive charge involved a separate act of travel on a different day. There was no attempt to carve several offenses out of a single transaction.

Universal C.I.T. is somewhat closer on its facts. As the Court pointed out, however, there was specific evidence in the legislative history of the Fair Labor Standards Act that Congress did not intend each breach of the statutory duty with respect to minimum wages and overtime owed to each employee during each work week to be treated as a separate crime. 344 U.S. at 222-24. Also, the language of the Act was ambiguous as to the proper unit of prosecution. If not construed to limit prosecution to an entire course of conduct no limit at all was imposed on the number of crimes that could be charged. Here, the statute is unambiguous; it is explicitly directed at acts of travel and use of interstate facilities, and the prosecution can charge only as many separate crimes as there were separate acts of travel or use of interstate facilities. Where the command of the statute as to the unit of the offense is clear, there is no room for application of the so-called "rule of lenity" of the *Bell* case. *See* Callanan v. United States, 364 U.S. 587, 596 (1961). It is true, as appellants point out, that the Supreme Court applied the "rule of lenity" to § 1952 in support of the ruling in *Rewis*, 401 U.S. at 812, that interstate travel by patrons of a gambling establishment did not violate the Act. But the Court premised this application upon a determination that there was an ambiguity in the language of § 1952 relating to persons covered. 401 U.S. at 811. There is no such ambiguity with respect to the unit of the offense.

[7]Congress may well have concluded there was a separate social interest in deterring each act of travel in furtherance of an illegal enterprise: each successive trip may increase the success of the illegal activity, and a decision not to make a given trip for fear of additional penal consequences could therefore limit the harm to society § 1952 is intended to prevent. *Cf. Irby v. United States*, 390 F.2d 432, 434 (D.C. Cir. 1967) (en banc).

XII. *Venue*

Appellants raise two venue-related claims. They contend venue was improperly laid in the Central District of California as to some of the substantive counts.[8] They also contend the trial court abused its discretion by denying motions under Federal Rule of Criminal Procedure 21(b) to transfer the proceedings to Detroit or Las Vegas.

A.

Appellants argue venue was improperly laid as to certain substantive counts for two reasons. First, relying on *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966), they argue that the act of carrying on, or distributing the proceeds of, unlawful activity, required to complete an offense under section 1952, did not occur in the Central District of California, though travel with the requisite intent did. Second, they argue that some of the defendants in each count were charged not with themselves traveling but with aiding and abetting the travel of others. Again, appellants rely on *Bozza*: "Congress seems to have been content with venue where the defendants' own accessorial acts were committed or where the crime occurred, without providing still another where the accessorial acts of agents took place." 365 F.2d at 221.

But in *Bozza*, the offense related to the offense of receiving stolen stamps. As the *Bozza* court pointed out, this is not "a continuing offense which is 'held, for venue purposes to have been committed wherever the wrongdoer roamed'. . . ." (*quoting Travis v. United States*, 364 U.S. 631, 634 (1961)) but rather is a " 'single act which occurs at one time and at one place in which only it may be tried, although preparation for its commission may take place elsewhere' " (*quoting Reass v. United States*, 99 F.2d 752, 754 (4th Cir. 1938)). 365 F.2d at 220.

In contrast, the offense under section 1952 is one "involving . . . transportation in interstate . . . commerce," which, by express provision of the general venue statute, "is a continuing offense and

[8]Appellants do not attack venue on the conspiracy count. "[A]n overt act committed in the course of a conspiracy which occurs in a district gives rise to jurisdiction to prosecute the conspirators in that district." United States v. Barnard, 490 F.2d 907, 910 (9th Cir. 1973). Several consequential overt acts are alleged to have occurred in the Central District of California.

. . . may be . . . prosecuted in any district from, through, or into which such commerce . . . moves." 18 U.S.C. §3237(a). *See United States v. Guinn*, 454 F.2d 29, 33 (5th Cir. 1972); *cf. United States v. Barnard*, 490 F.2d 907, 911 (9th Cir. 1973).

Thus, a defendant can be prosecuted for traveling in violation of section 1952, or for aiding and abetting such travel, in any district in which the travel occurred.

B.

Whether the proceedings should have been transferred is an entirely separate question. Rule 21(b), Federal Rules of Criminal Procedure, permits transfers "[f]or the convenience of parties and witnesses, and in the interest of justice." Since the decision as to whether to grant such a transfer "must largely rest in the sound judicial discretion of the trial judge," *Wagner v. United States*, 416 F.2d 558, 562 (9th Cir. 1969), our review is limited to whether that discretion was abused. We conclude it was not.

Appellants' first motion requested a transfer to Detroit; Las Vegas was also mentioned as a proper venue for trial, but the motion did not request transfer there. In support of their motion, appellants pointed out that most of the appellants and many of the anticipated defense witnesses lived in the Detroit area, and that much of the conduct relevant to the charges occurred there. But relevant conduct had occurred in many places, including the Los Angeles area and nearby Las Vegas, where the business enterprise that defendants allegedly sought to control was located. Nevada law was important to the case, as appellants argued. The relevance of this circumstance is obscure; in any event, it scarcely favored trial in Detroit as against Los Angeles. Both government and defense witnesses were widely dispersed, but 10 of the 31 persons on the government's list of anticipated witnesses resided in the Los Angeles area. The criminal calendar in the federal district court in Detroit was seriously delayed; the Los Angeles calendar, on the other hand, would permit the early trial for which appellants had repeatedly called. This consideration, admittedly relevant, *see Platt v. Minnesota Mining & Manufacturing Company*, 376 U.S. 240, 243 n. (1964), appears to have swung the balance.

On the basis of the information before the trial court, the decision on the first motion seems entirely reasonable. Appellants' resi-

dence was a factor to be considered, but was not controlling. *Platt v. Minnesota Mining & Manufacturing Company, supra,* 376 U.S. at 245-46; *Jones v. Gasch,* 404 F.2d 1231, 1240 n.43 (D.C. Cir. 1967). The considerations for and against a transfer seemed fairly balanced, or at least not so clearly weighted against Los Angeles as the trial forum as to overcome the substantial interest in avoiding the delay that would have followed transfer to Detroit's congested calendar.

Appellants' main argument is not that the court abused its discretion in the balance it struck on the facts before it on the first motion. Rather, appellants assert that "the prosecution misrepresented to the court that numerous of its witnesses would be Los Angeles area residents, and that Detroit witnesses desired by appellants would be called by the prosecution itself, thereby obviating some of the prejudice to the defense of a distant trial."

The trial judge was under no misapprehension regarding the Detroit witnesses when he ruled against the initial motion to transfer; the government had advised the court it did not intend to call more than one or two witnesses from Detroit. It is true that many of the Los Angeles witnesses on the government's first list disappeared from the second list, filed several months later. But it is hardly surprising that the prosecution's plans with respect to witnesses changed in the course of preparing this complex case for trial, particularly since government counsel who prepared the first list had been replaced by new government counsel.[9] Appellants' forecasts regarding the number and residence of their witnesses turned out to be no more reliable than the government's.

Several months after denial of the initial transfer motion, both sides filed new witness lists. The prosecution dropped most of its

[9] A situation could arise where the prosecution's representations to the judge were so far from the mark that they could only be treated as submitted in bad faith to improperly prevent a change of venue. In such a situation, we would look beyond the information presented to the trial judge in determining whether denial of transfer was within the judge's discretion, since the trial judge has a responsibility to pierce the prosecution's representations and assure that they are made in good faith. And, if the transfer were initially denied on the basis of prosecution information later shown to have been submitted in bad faith, the trial judge would be obligated to view a renewed motion as if it were an original one, without requiring the especially strong showing that may be required to support a late motion. *See* note 10 *infra.*

Los Angeles witnesses and added a number from Las Vegas. The defense renewed its motion for change of venue, this time pressing for transfer to Las Vegas. It appeared, however, that the condition of the criminal docket in Las Vegas was such that a reasonably speedy trial could not be obtained, whereas trial in Los Angeles was imminent. The trial court denied the renewed motion both on this ground and because the witnesses then expected to be called resided throughout the country.

This was not an abuse of discretion. It is proper to require a greater showing of inconvenience when a change of venue is sought late in proceedings.[10] As the trial court observed, there was no "ideal place for the holding of this trial." Wherever the trial was held, both sides would bear significant transportation and lodging expenses. Moreover, most of the Las Vegas witnesses were government witnesses; since the government appeared willing to pay the expense of transporting them, it is hard to see how defendants would be more inconvenieced by trial in Los Angeles than in Las Vegas. The improbability of a speedy trial in Las Vegas was a factor entitled to great weight, especially since one defendant had already moved for dismissal on speedy trial grounds.

The motion for change of venue was renewed a third time, after yet another set of witness lists was filed. The trial judge reiterated his belief that only compelling reasons could justify transfer when trial was imminent. For the reasons stated, this final denial was not an abuse of discretion.

XIII. *Giordano's Severance Motions*

Appellant Giordano complains that the trial court abused its discretion in denying his motions for severance under Rule 14, Federal Rules of Criminal Procedure, submitted both before and during trial.

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[10]Rule 22, Fed. R. Crim. Pr., provides that "[a] motion to transfer under these rules may be made at or before arraignment or at such other times as the court or these rules may prescribe," suggesting that the court may decline to entertain a late motion. *See* United States v. Tremont, 351 F.2d 144, 146 (6th Cir. 1965); Cagnina v. United States, 223 F.2d 149, 154 (5th Cir. 1955). Here, there has been a change in the situation since the initial venue decision. Nonetheless, to avoid the obvious opportunity for abuse it was proper to require a greater showing of inconvenience when trial was imminent.

Denial of Giordano's pretrial severance motion was clearly correct. Although Giordano was indicted on only one count, that count charged conspiracy. For obvious reasons, a joint trial is particularly appropriate where conspiracy is charged. *Davenport v. United States*, 260 F.2d 591, 594 (9th Cir. 1958). *See* American Bar Association, Standards Related to Joinder and Severance 39 (Approved Draft 1968).

The government represented that Giordano was among the "leaders" in the unlawful scheme and furnished the court with a summary of the evidence it expected to offer linking Giordano to the conspiracy. Moreover, the government stated that a separate trial would be substantially as long as a joint one, since a full exposition of the entire scheme was necessary to establish the significance of Giordano's separate conduct. On this record the advantages and economy of a joint trial clearly outweighed the remote possibility of unwarranted prejudice. *See United States v. Donaway*, 447 F.2d 940, 943 (9th Cir. 1971).

The balance may not have been so clear when Giordano moved for severance during trial. Although there is no suggestion of bad faith, the evidence against Giordano did not entirely justify government counsel's optimistic forecast. Nonetheless, there was sufficient evidence other than acts and statements of co-conspirators to show that Giordano participated in the conspiracy. Since this is so, it is difficult to understand how Giordano could have benefited from severance, for evidence of the acts and statements of the other defendants pursuant to and in furtherance of the conspiracy would have been admissible against Giordano if tried alone.[11] *United*

[11]Giordano stresses the fact that a very small proportion of the trial transcript relates directly to him; the government engages in elaborate analyses which, it claims, show that Giordano was not as peripheral to the proceedings as he claims. We do not consider, however, that the exact quantity of evidence relating to a conspiracy defendant personally is important in determining whether severance should have been granted. Although there are some cases which take this factor into account (*see* United States v. Branker, 395 F.2d 881, 888 (2d Cir. 1968); United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971)), they concern defendants against whom conspiracy charges were dismissed during trial. Dismissal of a conspiracy charge does not mean that severance is required. Schaffer v. United States, 362 U.S. 511, 516 (1960). It does, however, shift the balance of factors to be considered, *see Schaffer, supra*; a separate trial would not entail a replay of the joint conspiracy trial, and

States v. Kenny, 462 F.2d 1205, 1218 (3d Cir. 1972); *see also United States v. Roselli*, 432 F.2d 879, 901 (9th Cir. 1970). Moreover, as the government asserted, all or substantially all such evidence probably would have been introduced in a separate trial. It is possible that the government might have considered the time and effort required for a separate trial too great a price to pay for the conviction of Giordano alone, but loss of that possibility hardly demonstrates that Giordano was "prejudiced by a joinder" within the meaning of Rule 14.

The trial judge took great pains to protect Giordano's right to an independent evaluation by the jury of the evidence against him. Twice during voir dire the court admonished the jury that each defendant—naming them, including Giordano—was entitled to be judged as an individual. No less than six times during instructions to the jury the court stressed the importance of separate determinations of each defendant's guilt or innocence on the basis of the evidence pertaining to the particular defendant. Several times the court warned that association with participants in a conspiracy does not prove that a defendant was a member of the conspiracy. This jury's ability and determination to make discriminating judgments is evidenced by the fact that it did not convict one of the most active participants in the conspiracy, defendant Polizzi, on one of the nine substantive counts on which he was charged. Obviously, this jury did not render a mass judgment. *United States v. Berlin*, 472 F.2d 13, 15 (9th Cir. 1973). There may be cases in which even careful jury instructions cannot cure the possibility of prejudice by association inherent in conspiracy trials,[12] but this was not one of them.

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much of the evidence admitted in the joint trial could not be considered against the defendant no longer charged with conspiracy. In the instant case, most of the evidence not directed to Giordano personally was nonetheless admissible against him, so that the proportion of personally oriented evidence is not important.

[12] *See* Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring); United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971). *But see* United States v. Cozzetti, 441 F.2d 344, 349 (9th Cir. 1971); United States v. Patterson, 455 F.2d 264, 266-67 (9th Cir. 1971); United States v. Roselli, 432 F.2d 879, 902 (9th Cir. 1970), all holding that careful jury instructions can be sufficient to guard against this kind of possible prejudice from joinder.

Giving due recognition to the somewhat stricter showing required to justify severance when the trial has been partially or wholly completed,[13] we conclude that Giordano's motions for severance during trial were properly denied.

XIV *Giordano's Requested Instruction*

Giordano rested at the close of the government's case-in-chief. He asked for a jury instruction that no evidence introduced thereafter could be considered against him. The request was denied. Giordano's co-defendants then testified in their own defense. In arguing the case to the jury, the government drew implications from this testimony adverse to Giordano.

Giordano's decision not to offer evidence in his own behalf preserved his right to a review of the denial of his motion for acquittal on the basis of the government's evidence alone. *See United States v. Figueroa-Paz*, 468 F.2d 1055, 1058 (9th Cir. 1972). But this is not to say, if denial of the motion to acquit was proper, that the jury was not entitled to consider *all* of the evidence, including that presented by Giordano's co-defendants, in determining Giordano's guilt.

Evidence offered in defense in the trial of a single defendant is available for all purposes, and the rule is the same in a joint trial of multiple defendants—evidence offered by one may support the conviction of the others. *See Rickey v. United States*, 242 F.2d 583, 586 (5th Cir. 1957); *Maupin v. United States*, 225 F.2d 680, 682 (10th Cir. 1955). This court has held that the same rule is applicable even to a defendant who has rested at the close of the government's case, and an instruction of the kind sought by Giordano is therefore properly refused. *Brown v. United States*, 56 F.2d 997, 999-1000 (9th Cir. 1932).[14]

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[13]ABA, *Standards Relating to Joinder and Severance* 33 (Approved Draft 1968).

[14]Giordano cites one instance in which the instruction he requests was given, United States v. Schneiderman, 106 F. Supp. 906, 928 (S.D. Calif. 1952), but there was no discussion in *Schneiderman* of the issue. *See also* United States v. Interstate Engineering Corp., 288 F. Supp. 402, 413-14 (D. N.H. 1967); Devitt & Blackmar, Federal Jury Instructions § 10.06 (1970). *But see* United States v. Zambrano, 421 F.2d 761, 763 (3d Cir. 1970), supporting the *Brown* holding by necessary implication.

There is a substantial reason for the rule. One purpose of a joint trial of defendants allegedly involved in a single scheme is to facilitate evaluation by the jury of the evidence against each defendant in light of the entire course of conduct. "Such procedure not only increases the speed and efficiency of the administration of justice but also serves to give the jury a complete over-all view of the whole scheme and helps them to see how each piece fits into the pattern." *Rakes v. United States*, 169 F.2d 739, 744 (4th Cir. 1948). *See* ABA Standards Relating to Joinder and Severance 39 (Approved Draft 1968). This purpose of joinder would be frustrated as to a particular defendant if he could bar consideration as to him of some of the relevant evidence by resting before that evidence was introduced.

As we emphasized in *Brown*, a defendant who rests his case may nonetheless cross-examine or introduce evidence to impeach or contradict a co-defendant who testifies thereafter. *See also United States v. Zambrano*, 421 F.2d 761, 763 (3d Cir. 1970). In the present case, as in *Brown*, there was no request to cross-examine the co-defendants or to admit rebuttal evidence. It is even clearer here than in *Brown* that "if such request had been made, it would have been granted," 56 F.2d 1000, since the trial judge asked Giordano's attorney after each defense witness whether he had any questions to ask by way of cross-examination.[15]

XV *Sufficiency of the Evidence—Giordano*

We consider Giordano's contention that the evidence was insufficient as to him separately from the same contention as to other defendants. The case against Giordano was the weakest; and,

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[15]Because Giordano neither cross-examined his co-defendants nor offered rebuttal evidence, we are not faced, either here or in the next section of this opinion dealing with Giordano's motion for acquittal, with the problem presented in Cephus v. United States, 324 F.2d 893, 897-98 (D.C. Cir. 1963). In *Cephus*, the issue was whether a defendant waives his right to test the government's case-in-chief on appeal if he offers evidence only to counter a co-defendant's incriminating evidence; the Court of Appeals for the District of Columbia held that there is no waiver. This court has never squarely accepted or rejected the Cephus rule. *See* United States v. Figueroa-Paz, 468 F.2d 1055, 1058 (9th Cir. 1972); Verdugo v. United States, 402 F.2d 599, 604 n.4 (9th Cir. 1968).

unlike other defendants, Giordano did not waive his right to review of the motion to acquit made at the close of the government's case. For the latter reason, we consider only the evidence produced against Giordano in the prosecution's case-in-chief.

As Giordano points out, the government offered no direct evidence of his participation in the conspiracy.[16] But "circumstantial evidence is not inherently less probative than direct evidence," *United States v. Nelson*, 419 F.2d 1237, 1239 (9th Cir. 1969), and, in many conspiracy cases, is the only kind of evidence available. *White v. United States*, 394 F.2d 49, 51 (9th Cir. 1968). Thus, denial of the motion to acquit is subject to the same standard on review as it would be if there were direct evidence of guilt: whether "jurors reasonably could decide that they would not hesitate to act in their own serious affairs upon factual assumptions as probable as the conclusion" that Giordano participated in the conspiracy. *United States v. Nelson, supra*, 419 F.2d at 1245.

The government's theory was that at Zerilli's solicitation Giordano arranged for the investment of $150,000 in VFI when the enterprise was in critical need of funds; that the investment was made through Sansone, a St. Louis real estate investor and bank director, acting as a "front"; and that following the investment Giordano participated at various critical stages in the illegal enterprise.

Some of the government's circumstantial evidence is described briefly in the margin.[17] Possibly the series of events disclosed

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[16]Friedman, a co-conspirator who testified for the government, and Feil, another witness who testified directly to the illegal involvement of some defendants, offered no evidence implicating Giordano; none of the four government witnesses who might, on the prosecution's theory, have known of Giordano's involvement in the conspiracy, directly implicated him.

[17]Giordano and Zerilli were close friends. Giordano lived in St. Louis, Zerilli in Detroit. There were telephone calls between Giordano's home and office and Zerilli's, as well as other calls charged to Zerilli's credit card and placed to Giordano's numbers, at various key times in the course of events between June and November, 1967. Giordano knew the Cusumanos and the Sansones in St. Louis. The Sansones did not know Zerilli.

The need for additional money, which resulted in the issuance of the Class C debentures Sansone later bought, developed in early June. There

by the evidence could be explained as coincidence, or as normal contacts among friends. On the other hand, "[t]he jury un-

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were calls between telephones listed to Giordano and Zerilli at that time. Zerilli came to St. Louis for two days on June 8.

The Sansones began gathering money for their VFI investment after Zerilli visited St. Louis, but before the Class C debentures in which they invested were officially issued. They could have learned about the investment possibility only from a person having knowledge of the inner operations of VFI.

In early August, Giordano repaid an overdue loan to the Cusumano family trust. Less than three weeks later, Sansone took out a loan from the same trust. This loan was part of the money Sansone eventually invested in VFI. The Sansone loan was the only business transaction ever consummated between Sansone and the Cusumano family. It was unsecured. Although the VFI debentures in which Sansone invested yielded 4% interest, the loan from Cusumano was at 7%, an anomaly for which Sansone had no convincing explanation.

The Sansone investment was withdrawn less than 60 days after it was made, after Sansone was told by the Nevada Gaming Commission that he would have to apply for a gaming license, disclose the source of the invested funds, and provide fingerprints. Sansone testified that he withdrew only because, "I never anticipated that I would have to be classified as a gambler when I bought the debenture." But from the outset the Sansones admittedly knew they were investing in a gambling casino.

Giordano made five trips to Las Vegas between July and November 1967. The Giordanos have no business interests or relatives in Las Vegas, and Giordano was not a gambler. Each of these trips was closely preceded, or followed, or both, by telephone contact between Giordano telephones and Zerilli telephones or phone calls charged to Zerilli. Each trip coincided with an important event in the unlawful scheme. For example, trips in September and November coincided with the beginning and end of the $150,000 investment.

On September 12 there was a series of phone calls between Zerilli's home and Giordano's home and business. The next day, Sansone marshaled the entire $150,000. On that same day there was a call from a Zerilli telephone to Giordano's telephone. On September 14 Sansone flew to Las Vegas with the money to make the investment. He checked into the Frontier Hotel. Sixteen minutes later, Giordano checked into the Dunes Hotel. Four days later, Sansone deposited the $150,000 in VFI's account, received the debentures, and left Las Vegas. Giordano departed the following day. In November, a telephone call to Giordano was charged to Zerilli on the same day the Nevada Gaming Commission's letter was sent to Sansone. Giordano went to Las Vegas on November 9; Zerilli arrived and checked into the Frontier Hotel under an assumed name on November 10; and Sansone arrived on November 11 to complete the withdrawal of the $150,000 investment.

doubtedly could have found these events too interlocked to constitute coincidence" (*United States v. White, supra,* 394 F.2d at 53); it could have drawn from the events the inferences suggested by the prosecution—that Giordano was brought into the conspiracy at least as early as June; that he arranged for the investment of $150,000 in VFI through Sansone; and that the purpose of Giordano's five trips to Las Vegas in 1967 was to watch over this hidden interest in VFI and participate in various key decisions. There comes a point when the innocent explanation is so much less likely than the culpable one that jurors properly could decide that a defendant in fact was acting in furtherance of the conspiracy and shared its illegal purpose. We believe that point was reached here as to Giordano.

Three legal arguments subsidiary to Giordano's challenge to the sufficiency of the evidence should be mentioned.

1. The government called Cusumano and Sansone as witnesses. Both denied that Giordano was involved in a Cusumano loan to Sansone. Giordano argues that the government is bound by this testimony. But the notion that a party is bound by the testimony of every witness it calls is "long discredited," *Rodgers v. United States,* 402 F.2d 830, 833 (9th Cir. 1968), and is clearly not the law of this circuit. *See* cases cited in *Rodgers,* 402 F.2d at 833, n. 1.

Rodgers does hold that the government cannot rely on an inference when the *only* evidence presented by the government is inconsistent with the inference the government wishes drawn. However, *Rodgers* itself acknowledges that this does not "mean that in every case where some of the government's evidence is arguably contrary to an inference that it wishes to have the jury draw from other evidence, the inference may not be drawn." 402 F.2d at 834. *See also United States v. Payne,* 467 F.2d 828, 831 (5th Cir. 1972). Further, in *Rodgers* the evidence inconsistent with the desired inference was presented by a disinterested witness and was embodied in an uncontested document. Here, Cusumano and Sansone were interested witnesses with motives to dissemble about Giordano's role, and the prosecution presented a great deal of other evidence, albeit circumstantial, connecting Giordano with the loan. It may be reasonable to require the prosecution to do more than rely on a general inference to

counteract its own uncontested documentary evidence, but an inference specifically supported by other evidence is not barred simply because it is inconsistent with testimony of witnesses who were called by the government but have every reason to protect the defense.

2. Giordano argues that telephone company records showing calls between telephone numbers assigned to Giordano and Zerilli were inadmissible because there was no direct evidence as to who participated or what was said, citing *Laughlin v. United States*, 226 F. Supp. 112, 113 (D.D.C. 1964). But this case held only that such records were insufficient corroboration in a perjury case, where "direct and positive evidence of falsity of defendant's sworn statement" is required, and "circumstantial evidence thereof is insufficient, no matter how persuasive." 226 F. Supp. at 114. The Court of Appeals held such records admissible in a conspiracy case, distinguishing the district court's ruling in the earlier perjury case because of the high degree of corroboration necessary in a perjury case. *Laughlin v. United States*, 385 F.2d 287, 293 (D.C. Cir. 1967).[18]

Giordano also contends the government cannot rely upon inference to establish the contents of the telephone calls, citing *Osborne v. United States*, 371 F.2d 913, 927-29 (9th Cir. 1967). But in *Osborne*, each telephone call was the subject of a separate count charging a separate violation of 18 U.S.C. §1343, "Fraud by wire, radio, or television." Proof of the contents of the particular telephone call was therefore crucial to conviction on the particular count. In the present case, the exact content of each telephone call is not crucial to conviction; the telephone calls themselves are not the subject of the charge. Proof of their occurrence, especially their timing and frequency, is merely circumstantial evidence tending, with other circumstantial evidence, to show Giordano's participation in the conspiracy.

3. Giordano makes the same contention with respect to proof regarding his trips to Las Vegas—that no inference can be drawn from the fact that they occurred—and we reject it for the same reasons. He also argues that hotel records evidencing his stays at

[18] In the conspiracy case, there was evidence identifying the parties to the telephone calls (*see* 385 F.2d at 293), but the Court of Appeals did not rest admissibility upon this circumstance.

the Dunes Hotel in Las Vegas in 1967 should not have been admitted because other contemporaneous hotel records were destroyed "in accordance with routine hotel policy" prior to the return of the indictment in 1971. The argument is that if the indictment had been returned earlier the records might have been in existence and might have contained exculpatory or explanatory evidence demonstrating that Giordano's visit had an innocent purpose. Giordano cites *United States v. Marion*, 404 U.S. 307 (1971).

The contention is frivolous. The Sixth Amendment does not apply to pre-indictment delay, 404 U.S. at 313, and Giordano has not shown that the delay involved here violated the Due Process Clause. 404 U.S. at 324-26. We need not consider, therefore, whether suppression of evidence would be a proper remedy if a due process violation had occurred. *Cf. Strunk v. United States*, 412 U.S. 434 (1973).

DUNIWAY, Circuit Judge:

I concur in the portions of this opinion prepared by Judges Renfrew and Browning.

XVI. *Criminal Liability of Emprise Corporation.*

Appellant Emprise Corporation argues that it is not liable for any criminal acts committed by its predecessor in interest. The facts are these: Before March 1, 1970, there was a New York corporation called High Park Corporation, which owned all of the shares of another New York corporation, Emprise Corporation (Old Emprise). On March 1, 1970, Old Emprise merged into its parent, High Park Corporation. On March 17, 1970, High Park Corporation amended its corporate name to Emprise Corporation (New Emprise).

The February 26, 1971, indictment in this case charged "Emprise Corporation" as a defendant. In July, 1971, it became clear that this meant Old Emprise, and, on September 9, 1971, the district court dismissed as to Old Emprise for want of personal jurisdiction over it. The government filed an information against New Emprise. New Emprise moved to dismiss, but this motion was denied, and New Emprise was convicted of violating 18 U.S.C. §§371 and 1952 and was fined $10,000. The charged offense was committed by Old Emprise, before the merger.

The question is whether the surviving corporation of a merger, here New Emprise, can be held criminally liable for acts committed by a former subsidiary constituent corporation (Old Emprise) which later merged into the survivor.

Appellants argue that in this federal case we must apply federal law, regardless of what the state law may be, and that under federal law only the constituent corporation, not the surviving corporation, can be prosecuted. Of course we apply federal law. That, however, does not answer the question. Federal courts, in deciding federal cases, often borrow otherwise applicable state law as the federal law to be applied in a federal case when doing so is reasonable and there is no contrary federal policy. Here, Old Emprise and New Emprise are New York corporations. We can think of no federal policy that would prohibit our borrowing New York law in deciding whether New Emprise is liable for a crime committed by Old Emprise. Neither can appellants, beyond mere assertion.

Under the Constitution, the federal government is not expressly granted the power to form corporations; it may do so only under the necessary and proper clause.[1] *See, e.g., McCulloch v. Maryland,* 1819, 17 U.S. (4 Wheat.) 316. The result is that nearly all corporations in the United States are creatures of state law. This also means that when Federal statutes refer to "corporations" they necessarily include within that word corporations created under state law. Some Federal statutes are expressly applicable to state created corporations. *See, e.g.,* 15 U.S.C. §7; *Melrose Distillers v. United States,* 1959, 359 U.S. 271, 272. In this case New Emprise was convicted of violations of 18 U.S.C. §§371 and 1952. §371 refers to "persons" and §1952 to "[w]hoever." Under the Federal Rules of Construction, 1, U.S.C. §1.

> "In determining the meaning of any Act of Congress, unless the context indicates otherwise—
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> the words 'person' and 'whoever' include corporations • • • as well as individuals;
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The term "corporations" as used in 1 U.S.C. §1 clearly includes corporations formed under state law. See *Alamo Fence Company*

[1] *U. S. Const.* art. I, §8.

of Houston v. United States, 5 Cir., 1957, 240 F.2d 179, 181. Nothing in the contexts of §§371 and 1952 indicates meanings for the terms "persons" and "whover" other than those of 1 U.S.C. §1. Therefore, the existence and status of corporations charged under §§371 and 1952 should be determined by reference to the law of the state of their incorporation, unless the application of that law would conflict with federal policy. *Cf. Melrose Distillers v. United States, supra*, 359 U.S. at 274. In this case, no such conflict exists, and New York law, therefore, will be applied.

Convenience and common sense also point to the adoption of New York law as the federal law in this case, for the purpose of determining whether New Emprise is criminally liable. Both Old and New Emprise are artificial creations, wholly dependent on New York law for their existence. New York law defines their powers, rights and liabilities, prescribes their procedures, governs their continued existence, and defines the terms upon which mergers may occur and the effect to be given to mergers. These corporations were created under New York law by people, however, and any penalty imposed on them is, indirectly, a penalty imposed upon the people who own and control them. If New York law provides for the imposition of such a penalty for acts for which those people bear the ultimate responsibility, there is no good reason for relieving them of the penalty because it arises from federal law. See *Alamo Fence Company of Houston v. United States, supra*, 240 F.2d at 183.

Under modern state corporation laws, a corporation once formed, in the absence of a provision limiting its juristic life, exists perpetually unless it is dissolved or its corporate charater is annulled.[2] It is often said that the merger of a corporation into another is similar to the death of an individual, in that all current or future litigation by or against it is abated except insofar as the state of

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[2]"Neither bankruptcy . . . nor cessation of business . . . nor dispersion of stockholders, nor the absence of directors . . . nor all combined, will avail without more to stifle the breath of juristic personality. The corporation abides as an ideal creation, impervious to the shocks of these temporal vicissitudes. Not even the sequestration of the assets at the hands of a receiver will terminate its being." *Petrogradsky Mejdunarodny Kommerchesky Bank v. Nat'l City Bank of New York*, 1930, 253 N.Y. 23, 31-32, 170 N.E. 479, 482 (Cardozo, C.J.), *reargument denied*, 1930, 254 N.Y. 563, 173 N.E. 867, *cert. denied*, 1930, 282 U.S. 878.

incorporation may continue its juristic life. *Melrose Distillers v. United States*, 1959, 359 U.S. 271, 272; *Oklahoma Natural Gas Co. v. Oklahoma*, 1927, 273 U.S. 257, 259-60; *United States v. Safeway Stores, Inc.*, 10 Cir., 1944, 140 F.2d 834, 836; *United States v. Brakes, Inc.*, 157 F.Supp. 916, 918-19 (S.D.N.Y. 1958); *United States v. Cigarette Merchandisers Ass'n*, 136 F.Supp. 214, 215 (S.D.N.Y. 1955) (and cases cited therein at 215, n.4). We turn to the New York law to determine the effect of the merger in this case.

The relevant state statute governing the question here is *N.Y. Bus. Corp. Law* §906(b)(3) (McKinney 1963), which provides that after a certificate of merger or consolidation has been filed,

> The surviving or consolidated corporation shall assume and be liable for all of the liabilities, obligations and penalties of each of the constituent corporations. No liability or obligation due or to become due, claim or demand for any cause existing against any such corporation, or any shareholders, officer or director thereof, shall be released or impaired by such merger or consolidation. No action or proceeding, whether civil or criminal, then pending by or against any such constituent corporation, or any shareholders, officer or director thereof, shall abate or be discontinued by such merger or consolidation, but may be enforced, prosecuted, settled or compromised as if such merger or consolidation had not occurred, or such surviving or consolidated corporation may be substituted in such action or special proceeding in place of any constituent corporation.

The first sentence of §906(b)(3) states that the surviving corporation is liable for its constituents' "liabilities, obligations and penalties. . . ." While no court has decided whether "liabilities" and "obligations" as used in §906(b)(3) refer to criminal liabilities and obligations, two courts have held that these words, as used in other provisions of New York's corporation laws, do refer to criminal liability. *United States v. Cigarette Merchandisers Ass'n.*, *supra* (construing §90 of the New York Stock Corporation Law); *People v. Bankers' Capital Corp.*, 1930, 137 Misc. 293, 241 N.Y.S. 693 (construing §216(1)(e) of the New York General Corporation Law). We note, too, that §906(b)(3) also uses the word "penalties." We therefore hold that the first sentence of §906(b)(3)

permits the maintenance of a prosecution against the surviving corporation for crimes allegedly committed by a constituent corporation.

Such a construction of New York's corporation law is not unique. New York courts have held that civil causes of action arising before a merger or consolidation may be instituted against the surviving or the consolidated corporation. *O'Brien v. New York Edison Co., et al.* (two cases). 19 F.Supp. 968 (S.D.N.Y. 1937); *Cameron v. United Traction Co.*, 1902, 67 App. Div. 557, 73 N.Y.S. 981; *Lee v. Stillwater and Mechanicville St. Ry. Co.*, 1910, 140 App. Div. 779, 125 N.Y.S. 840. Appellants cite numerous cases which hold that a constituent corporation[3] or a dissolved corporation[4] remains subject to criminal prosecution. None of these cases, however, holds that a surviving corporation (in the case of a merger or consolidation) may not be prosecuted. These cases therefore do not conflict with our holding. We adopt, as to the liability of New Emprise, the New York law as the federal law in this case. We leave to another day the question whether we would borrow applicable state law if that law were to purport to relieve both the constituent corporation and the surviving corporation of liability for crimes of the constituent corporation.

XVII. *Sufficiency of the Evidence.*

Appellants argue that the evidence is insufficient to sustain their convictions. Except as to appellant Giordano, whose arguments we have discussed above (see part XV, *supra*, their arguments lack

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[3]*United States v. Stone*, 8 Cir., 1971, 452 F.2d 42; *United States v. Anaconda American Brass Co.*, 210 F.Supp. 873 (D.Conn. 1962); *United States v. Maryland and Virginia Milk Producers, Inc.*, 145 F.Supp. 374 (D.D.C. 1956); *United States v. Cigarette Merchandisers Ass'n, Inc., supra*; *United States v. Union Carbide and Carbon Corp.*, 132 F.Supp. 388 (D.Colo. 1955), *modified*, 10 Cir., 1956, 230 F.2d 646.

[4]*Melrose Distillers, Inc. v. United States, supra*; *United States v. BBF Liquidating, Inc.*, 9 Cir. 1971, 450 F.2d 938; *Alamo Fence Co. of Houston v. United States*, 5 Cir., 1957, 240 F.2d 179; *United States v. P. F. Collier & Son Corp.*, 7 Cir., 1953, 208 F.2d 936; *United States v. Globe Chemical Co.*, 311 F.Supp. 535 (S.D. Ohio 1969); *United States v. Arcos Corp.*, 234 F.Supp. 355 (N.D. Ohio 1964); *United States v. San Diego Grocers Ass'n, Inc.*, 177 F.Supp. 352 (S.D. Cal. 1959); *United States v. Brakes, Inc., supra.*

substance. It would serve no useful purpose to set out the evidence in detail. We have examined it, and we find it more than sufficient.

XVIII. *The Taint of Illegal Electronic Surveillance.*

Appellants claims that the trial was materially tainted by leads from unlawful electronic surveillance.

Between 1962 and 1965, the government intercepted and recorded numerous telephone conversations of appellants Zerilli, Polizzi and Giordano. The product of this surveillance is embodied in typewritten transcriptions or "logs" of the intercepted conversations. The government concedes that the electronic surveillance was conducted illegally.

The prosecutors were initially unaware of this surveillance, but on June 3, 1971, they were informed of it by the Justice Department. On September 8 ,1971, the district court ruled that there would be a post-trial *Alderman* hearing.[5] An *in camera* hearing was held on November 13, 1971, at which the court ruled that pretrial access to the logs would be limited to appellants Zerilli, Polizzi, Giordano, and their respective attorneys. At the post-trial *Alderman* hearing, which commenced on June 12, 1972, and continued on June 13, June 14, June 15, June 23, and July 7, 1972, the court concluded that "the evidence in this case came from an independent source and was not tainted by the illegal electronic surveillance."

Appellants argue that the evidence accumulated from the unlawful surveillance was used in their prosecution and fatally contaminated their trial. Alternatively, they ask that we remand for a more complete *Alderman* hearing.

a. *Standing.*

Only Zerilli, Polizzi and Giordano were subjected to electronic surveillance and the court ordered that only these three appellants and their attorneys be given access to the logs. On appeal, appellants Shapiro and Bellanca assert that they, as coconspirators, should also have been given access to these logs. This same argument was made by petitioners in *Alderman v. United States, supra,* and was rejected. 394 U.S. at 171-76. See also *Mancusi v. DeForte,* 1968, 392 U.S. 364; *Simmons v. United States,* 1968, 390 U.S. 377;

[5] *Alderman v. United States,* 1969, 394 U.S. 165.

Jones v. United States, 1960, 362 U.S. 257, 261; *Wong Sun v. United States*, 1963, 371 U.S. 471, 491-92; *Goldstein v. United States*, 1942, 316 U.S. 114, 121. The court's ruling as to standing was correct.

b. *The Existence of Taint.*

At an *Alderman* hearing, the court must determine whether the prosecution used unconstitutionally seized material directly or indirectly to develop the evidence it produced at trial, or obtained its trial evidence from an independent and untainted source. *Alderman v. United States, supra*, 394 U.S. at 183. A defendant who shows that he was the victim of an unconstitutional search "must go forward with specific evidence demonstrating taint." 394 U.S. at 183. Then the burden shifts to the government to show that it acquired its evidence from an independent source.[6]

Appellants make numerous arguments to show that their trial was tainted by the use of the logs. We consider them seriatim.

1. *The benchside conference of March 28, 1972.*

Polizzi testified on direct examination that he was unable to obtain a Nevada gambling license in March, 1966, because he had a "problem." [R.T. 5391, 5398, 5402.] On cross-examination, the prosecutor asked the nature of Polizzi's problem. Polizzi then stated that his "problem" was that in 1963 he had been placed on the Attorney General's list of Mafia figures. [R.T. 5466.]

On redirect examination, Polizzi's attorney returned to the subject of the Mafia. Polizzi testified:

> "It was Mr. George Edwards who was the police commissioner of the City of Detroit that made his testimony before the Senate Committee, and he was the one that was directly responsible for putting my name on this chart.

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[6] "The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin." *Nardone v. United States*, 1939, 308 U.S. 338, 341. *See also Alderman, supra*, 394 U.S. at 183.

> . . . I was very disturbed and felt that I was falsely accused. I wrote a letter to the Mayor of Detroit and felt that it was unjust that for no rhyme or reason to just be put on there and be falsely accused of these things . . . ." [R.T. 5576-77.]

At this point, Mr. Kotoske, the prosecutor, approached the bench and, outside of the jury's hearing, told the court that Polizzi was perjuring himself and threatened to introduce the surveillance logs showing Polizzi's ties with organized crime in Detroit:

> "Mr. Kotoske: . . . [I]f [Mr. Murphy, Polizzi's attorney] read those logs at all he understands that this man on the witness stand [Polizzi] and Tony Zerilli laid out the whole Mafia organization in Detroit, how they cut up black money— . . . .
>
> They laid out the whole organization, who is on this payoff, who is running the rackets, how the money is transferred, all discussion about black money, who it is that they have to eliminate from the organization, who they are going to—the whole complete thing, the complete structure is laid out there.
>
> I have sat by for about six weeks and let this nonsense go on. If he continues to persist in this, I have no alternative but to confront this witness with his own transcription of his voice and make him out a crown liar right in this courtroom.
>
> I don't want to do that . . . .
>
> We had better draw the line and abandon the topic or I am telling counsel I will come forward with those logs . . . .
>
> The Court: Mr. Murphy, let me say this:
>
> . . . [T]his thing has gone far enough. You have the ability to have your client make the explanation that he has made, but my suggestion to you—I am not ordering it at all, but my suggestion to you is that you ought not go much further with that, because it may open a wider door than you want to have opened. And I do not want this trial to get into a public accusation of who is or is not a member of the Mafia . . . ." [R.T. 5578-80.]

The line of questioning about the Mafia was dropped by Polizzi's counsel and the government never introduced the logs to impeach Polizzi's testimony.

Appellants contend that the incident was a use of the surveillance logs at the trial and tainted the entire case. We cannot agree, although it was indeed a "use." First, no evidence from the logs was actually introduced. The prosecutor only threatened to use the logs to impeach Polizzi's character. Second, the government's threat came only after Polizzi at least twice testified to his own lack of Mafia connections, once on direct and again on cross. It cannot be said that the prosecutor's threat hindered the defense from making its point to the jury. Third, the threat to use the tapes did not form part of the government's case; it related solely to impeachment, after Polizzi had testified to his own lack of Mafia ties. *Walder v. United States*, 1954, 347 U.S. 562, 565; *cf. Harris v. New York*, 1971, 401 U.S. 222. Such use would not be an unlawful taint.

2. *The leak to the press..*

On March 29, 1972, the day after the benchside conference, one Gene Blake, a *Los Angeles Times* reporter, was seen reading the government's copy of the previous day's transcript. [R.T. 5786.] Defendants' counsel accused the prosecutor of deliberately providing Mr. Blake with the transcript; the prosecutor denied this charge.[7] Defendant's counsel then asked the court to order the *Times* not to report on the March 28 benchside conference, but the court refused.

The next day a *Times* article was headlined "Transcript Shows U. S. Bugged Vegas Defendants' Mafia Talks." The article contained direct quotes from the March 28 benchside conference concerning the surveillance logs. Appellants assume that the jury saw this article and took it into account in reaching its verdict, and that therefore the trial was tainted by information from the logs. We cannot agree. There was no evidence that any juror read this article, nor were the logs used by the jury in their delibera-

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[7] "Mr. Kotoske: May I make a full and complete but short statement, your Honor?

[A]bout giving transcripts of the daily proceedings to any newspaperman, I never in my life have done that. I have never done that in this case. I did see Mr. Blake reading from the transcript and I personally took it upon myself to go over to him this morning and ask him to please not print anything that transpired at the side bar. That is the fact, that is not fantasy." R.T. 5790-91.

tions. Thus there was no "relevance to [appellants' convictions] of any conversations which may have been overheard through . . . surveillance." *Alderman v. United States, supra,* 394 U.S. at 186.

3. *The Friedman sentencing memorandum.*

One of the major sources of the prosecutor's case was the Friedman sentencing memorandum, a document prepared in connection with the sentencing of Maurice Friedman on February 3, 1969, in another case. Appellants claim that this document was tainted by information from the surevillance logs.

Looking at the evidence in the light most favorable to the government, the following testimony was produced concerning the sentencing memorandum: U. S. Attorney David Nissen, who wrote this memorandum, relied on three sources for its preparation: (1) information he received from FBI agent Wayne Hill, (2) a tape supplied to him by one Dr. Victor Lands in connection with another trial (the Lands transcript), and (3) information he received from (then) U. S. Attorney William Matthew Byrne, Jr. [R.T. 10,029-31.]

Appellants do not claim that the Lands transcript or Byrne's information is tainted; their only objection concerns agent Hill's information. Hill testified that all the information he received, which he subsequently passed on to Nissen, came from either "live Bureau informants" (civilian informants) or from the Intelligence Division of the Los Angeles Police Department. [R.T. 9421-24.] He was then asked:

> "Q. Now do you know, Mr. Hill, that any of the information you provided Mr. Nissen that found its way into this sentencing memorandum was the result or can in any way be attributed to the surveillance logs in this case?
>
> A. No, it could not." [R.T. 9425.]

On cross-examination, Hill said that these live Bureau informants gave information to various FBI agents around the country, who passed the material on to Hill, who, in turn, passed the information on to Nissen, who wrote the memorandum. [R.T. 9522-23, 9563-65.] Although the names of the informants were not revealed [R.T. 9523], agent Hill did provide the names of two FBI agents who received such information. [R.T. 9524, 9531, 9563-

64.] The appellants did not produce any evidence to refute Hill's testimony. The court properly concluded that the Friedman sentencing memorandum was not tainted.[8]

4. *Lack of FBI monitors at the Alderman hearing.*

Appellants argue that they did not receive a fair *Alderman* hearing because only one of the FBI personnel who conducted electronic surveillance was called as a witness.

Alderman provides a flexible standard as to what witnesses must be examined in a taint hearing:

> "Armed with the specified records of overheard conversations and with the right to cross-examine the appropriate officials in regard to the connections between those records and the case made against him, a defendant may need or be entitled to nothing else. Whether this is the case or not must be left to the informed discretion, good sense, and fairness of the trial judge." *Alderman, supra,* 394 U.S. at 185.

The district court adopted the following procedure to govern the taint hearing: There were numerous government officials throughout the country who had had access to the surveillance logs. The critical issue at the taint hearing, however, was not whether these officials had had access to the logs but whether any knowledge of the contents of the logs was imparted by these officials to the United States prosecutors in Los Angeles. Thus, instead of bringing all the government officials to the hearing, the court ordered the government to provide the defense with the names of all of them so that the defendants could ask each government prosecutor, on the witness stand, whether he had received any information

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[8]Appellants claim that "the court refused even to permit appellants, at their own expense to produce those agents to find out the names of the purported live informants who are the sources of the Friedman sentencing memorandum allegations [52 RT 10,474-76]." Electronic Surveillance Brief at 20. The court clearly acted within its discretion in refusing to allow the names of the informants to be revealed. Appellants, however, could have called these agents to ask other questions about how they gathered the information which was subsequently passed on to Hill. The court did not preclude the appellants from calling these agents.

about the logs from the named officials.[9] [Clerk's Transcript (hereinafter referred to as C.T.) 3321.]

At the taint hearing, three members of the prosecution team testified that the source of this case was the Friedman interview and sentencing memorandum.[10] Two members of the team testified that they were not even aware of the existence of the logs when the indictments in this case were handed down on February 26, 1971.[11] Judge Byrne, who left the United States Attorney's office in May, 1970, testified that he did not know that the logs existed in February, 1970, when he interviewed Mr. Friedman. [R.T. 9225.] U. S. Attorney Hornbeck knew of the existence of the logs, but had not read them and therefore did not use any information from the logs to assist him before the grand jury. [R.T. 10,262.] In addition, three members of the team testified that they did not contact any government officials who had access to the logs.[12] Two other attorneys did contact one of these officials, James Ritchie,[13] but none of the information received from Ritchie related to the logs. This information, which consisted of some bank records, audits, and IRS personal interviews, was the result of subpoenas served on banks or of personal interviews.

The picture which thus emerges from the taint hearing is that no member of the prosecution team had read the logs or had any information derived from them when the indictments were handed down. Only two attorneys had contacted a government official who had access to these logs, and the information received from him was not derived from the logs. Moreover, by the time the indictments were handed down the evidence gathering process was complete, and no other significant evidence was produced at the

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[9]The court did not preclude calling any of these officials as witnesses, but stated only that they should not be called "unless there is some reason to believe that any of those persons communicated any information received from the tapes to any of the persons who had charge of the preparation of the evidence in this case." C.T. 3321.

[10]R.T. 9224 (U. S. Attorney Byrne), 9546-47 (agent Hill), 10,031 (U. S. Attorney Nissen).

[11]R.T. 10,032-33 (U. S. Attorney Nissen), 9283 (U. S. Attorney Friedman).

[12]R.T. 9282-84 (Friedman), 9428-29, 9437-39 (Hill), 10,033 (Nissen).

[13]R.T. 10,245-46 (Hornbeck), 9751 (Uelmen).

trial. Counsel for appellants did not produce any witnesses to refute this testimony.

While FBI monitors have testified at some taint hearings,[14] there is no rule that they must testify. The issues raised in cases in which the court has ordered FBI personnel to testify[15] are obviated here as a result of the prosecution team's undisputed testimony that they received no information related to the logs from any government officials who had access to the logs.

The district court concluded that the government met its "ultimate burden of persuasion to show that its evidence is untainted." *Alderman, supra,* 394 U.S. at 183. Having carefully examined the evidence produced at the taint hearing, we agree with the district court's finding.

We find it interesting that nowhere in their briefs do defense counsel, who had access to the logs, assert that anything in them was of such a character as to provide any leads or information pointing to or material to the present prosecution.

Affirmed.

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[14] *See, e.g., United States v. Stassi,* 5 Cir., 1970, 431 F.2d 353; *Baker v. United States,* D.C. Cir., 1970, 430 F.2d 499, *cert. denied,* 1970, 400 U.S. 965; *United States v. Clay,* 5 Cir., 1970, 430 F.2d 165, *rev'd. on other grounds,* 1971, 403 U.S. 698; *United States v. Ivanov,* 342 F.Supp. 928 (D.N.J. 1972).

[15] *See, e.g., United States v. Giordano,* 6 Cir., 1971, 440 F.2d 449; *United States v. Alderisio,* 10 Cir., 1970, 424 F.2d 20.

APPENDIX B

United States Court of Appeals
For the Ninth Circuit

United States of America, Plaintiff-Appellee, vs. Michael Santo Polizzi, Jack S. Shapiro, Peter James Bellanca, Anthony Giardano, Arthur J. Rooks, Anthony Joseph Zerilli, Emprise Corporation, a New York Corporation, Defendants-Appellants.	No. 72-2983, 72-2984, 72-2985, 72-2986, 72-2987, 72-2988, 72-2989 DC No. 7574 DWW

JUDGMENT

Appeal from the United States District Court for the Central District of California.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Affirmed.

Filed and entered April 30, 1974.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. MICHAEL SANTO POLIZZI, *Defendant-Appellant.*	No. 72-2983
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JACK S. SHAPIRO, *Defendant-Appellant.*	No. 72-2984
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. PETER JAMES BELLANCA, *Defendant-Appellant.*	No. 72-2985
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ANTHONY GIORDANO, *Defendant-Appellant.*	No. 72-2986
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ARTHUR J. ROOKS, *Defendant-Appellant.*	No. 72-2987
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ANTHONY JOSEPH ZERILLI, *Defendant-Appellant.*	No. 72-2988
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. EMPRISE CORPORATION, a New York corporation, *Defendant-Appellant.*	No. 72-2989 ORDER

[July 18, 1974]
[July 25, 1974]*

* Per Order of Court of Appeals dated August 5, 1974, the date of entry of this Order was corrected to July 25, 1974.

Before: BROWNING and DUNIWAY, Circuit Judges, and **RENFREW, District Judge

The opinion filed April 30, 1974, is modified as follows:

Slip Opinion, page 3, third line from bottom:

Change line to read: "lant Giordano's* motion for severance." Add the following footnote: " *In the indictment, appellant's name was spelled Giardano. His true name is Giordano."

Slip Opinion, page 16, lines 14-16:

Change lines to read: "at 492. That phrase does not require specific intent to violate state law, but rather specific intent to facilitate an activity which the accused knew to be unlawful under state law. This interpretation, apart from its inconsistency with the literal".

Slip Opinion, page 35, last line, to page 36, line 6:

Delete the third and fourth sentences of the paragraph and footnote 57 on page 36 and substitute the following: "There was no express reference to the Mafia in the prosecutor's statement, nor could such a reference be reasonably implied."

Slip Opinion, page 36, seventh line from bottom, to page 37, line 20:

Delete the last four sentences of the paragraph beginning on page 36 and the first two full paragraphs and footnote 58 on page 37, and substitute the following:

For all that the jury knew from Polizzi's direct testimony, his "problem" could have been one of short duration—e.g., insufficient financing—which would not have indefinitely precluded licensing. If so, there would have been no motive for furtive investment. Thus, the nature of Polizzi's "problem" was clearly relevant. And while the trial judge did order Polizzi to answer the question regarding the "problem" he did not order the defendant to use the word "Mafia." Pollizi

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**Honorable Charles B. Renfrew, United States District Judge, Northern District of California, sitting by designation.

could have answered the question truthfully and specifically without using the "Mafia" term—for example, he could have said that he understood that he would not be considered a suitable person for a license.

Thus, since the general nature of Polizzi's problem was directly relevant and the prejudicial Mafia connection was volunteered by Polizzi, the trial court's ruling was well within its wide discretion in controlling cross-examination and in balancing its probative value against possible prejudice.

This result is even clearer as to Zerilli. The reason why Zerilli could not be licensed was not admissible merely to impeach Zerilli or his attorney—it was directly relevant to Zerilli's guilt. If the reason Zerilli could not be licensed was, as he testified, his ownership interest in a race track, then his testimony of continuing interest in the enterprise because of an intention to invest later might be credible. The race track regulation was apparently unclear and Zerilli could in any event sell his race track interest. However, if the reason he could not be licensed was his reputation, then any hope of investing later would be doubtful since his reputation was unlikely to change. Zerilli therefore had a strong motive to make his investment surreptitiously. Moreover, there was no mention of the Mafia in connection with Zerilli, only of his "reputation," so that the court did not err in permitting the government to cross-examine Zerilli on the reasons why he could not be licensed.

Slip Opinion, page 49, lines 8-10:

Delete the second sentence of the paragraph and footnote 77.

Slip Opinion, page 50, line 1:

Delete the reference to footnote 78 and the footnote.

Slip Opinion, page 71, lines 6-8:

Delete the first sentence of the paragraph and substitute the following: "Between 1962 and 1965, the government conducted electronics surveillance against appellants Zerilli, Polizzi and Giordano."

Slip Opinion, page 74, line 12:

Change citation to read: *Walder v. United States,* 1954, 347 U.S. 62, 65.

Slip Opinion, page 78, lines 14-17:

Delete the entire paragraph.

Slip Opinion, pages 37-50:

Change footnote 59 to 57 and renumber the following footnotes to reflect the deletion of present footnotes 57, 58, 77 and 78.

The panel as constituted in the above cases has voted to deny the petitions for rehearing and to reject the suggestions for rehearing in banc.

The full court has been advised of the suggestions for in banc rehearing, and no judge of the court has requested a vote on the suggestions for rehearing in banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing in banc are rejected.

Dated: July 18, 1974

APPENDIX D

Affidavit of Logan J. Lane

State of California, County of Los Angeles—ss.

I, the undersigned, LOGAN J. LANE, make the following declaration:

I am a professional investigator licensed by the State of California.

I interviewed Alfred L. Palmer at Los Angeles, California, on May 12, 1974. Mr. Palmer acknowledged to me that he was a juror in "The Frontier Hotel case."

During the interview, Palmer acknowledged that at a federal court hearing some two years ago, occurring after the jury verdict had been rendered in that case, Palmer had spoken with a defense attorney from Detroit and that, in Palmer's presence, the attorney correctly reported to the court what Palmer had just stated to the attorney in private conversation.

During my interview with him, Palmer stated with reference to the same court hearing, that the prosecutor who won the case spoke to him in the hallway outside the courtroom and told him, Palmer, that he had no business being there, and that he should leave the courthouse and not return. Palmer told me, "I thought he was right, and the best thing for my own good was to leave. So I left."

/s/ Logan J. Lane
Logan J. Lane

Sworn to before me this 22nd day of May, 1974.

/s/ Thelma P. Pedersen
Notary Public for the
State of California

APPENDIX E

Affidavit of Special Agent Robert J. McCarthy
[Exhibit 1 on Motion to Suppress]

Washington, D.C.
August 2, 1971

This is to certify that I, Robert J. McCarthy, Special Agent, Federal Bureau of Investigation, supervised the handling of an inquiry from the United States Department of Justice for electronic surveillance coverage information on Anthony Giordano, Louis M. Jacobs, Anthony Joseph Zerilli, and Michael Santo Polizzi.

I certify that all logs and airtels which were previously furnished to the United States Department of Justice represent the entire bank of transcripts relating to these defendants who are named in an indictment in the United States District Court for the Central District of California.

I further certify that the original tape recordings relating to the transcripts submitted in this case have been routinely destroyed.

/s/ Robert J. McCarthy
Robert J. McCarthy
Special Agent
Federal Bureau of Investigation

District of Columbia:

Subscribed and sworn to by Robert J. McCarthy on August 2, 1971, before the undersigned at Washington, D.C.

/s/ Louise D. Walter
Notary Public

My Commission Expires: [Indistinct]

LOUISE D. WALTER
MY COMMISSION EXPIRES AUG. 14, 1973.